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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Alabama,

DURING THE

NOVEMBER TERM, 1901.

—BY—

PHARES COLEMAN,
STATE REPORTER.

VOL. CXXXIII.

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2d Circuit.....	HON. J. C. RICHARDSON.....	Greenville.
3d Circuit.....	HON. A. A. EVANS.....	Clayton.
4th Circuit.....	HON. JOHN MOORE.....	Marion.
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7th Circuit.....	HON. JOHN PELHAM.....	Anniston.
8th Circuit.....	HON. O. KYLE.....	Decatur.
9th Circuit.....	HON. J. A. BILBRO.....	Gadsden.
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12th Circuit.....	HON. JOHN P. HUBBARD.....	Troy.
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SUPERNUMERARY JUDGE.

HON. A. H. ALSTON.....	Clayton.
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			HON. DANIEL A. GREENE....	Birmingham.
Criminal Court of Pike				
County.....			HON. E. B. WILKERSON.	Troy.

*Hon. James W. Lapsley died Nov. 22, 1901; and Hon. Thomas W. Coleman, Jr., was appointed as his successor on Nov. 28, 1901.

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ERRATA.

In the 3d to the last line in the 3d headnote, in the case of *Brown v. Fowler*, on page 310, for "§ 897," read §894.

In the 1st line of the 3d headnote, in the case of *Hood v. Southern Railway Co.*, on page 374, for "bill" read *appeal*.

In the last line of the 1st headnote in the case of *Collier v. Carlisle*, page 478, for "*plant*" read *plainant*, so as to make the word read *complainant* instead of "*complant*."

In the 5th line of the 4th headnote, in the case of *Southern Car & Foundry Co. v. State*, page 634, for "§ 2142," read §4122.

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CASES

IN THE

SUPREME COURT OF ALABAMA

NOVEMBER TERM, 1901.

Jacobi v. The State.

Indictment for Assault with Intent to Rape.

1. *Evidence; when secondary evidence of testimony of absent witness admissible.*—When a witness has removed from the State permanently or for an indefinite time, his testimony on any former trial of the defendant for the same offense may be given in evidence against the defendant on any subsequent trial.
2. *Same; same; case at bar.*—On a trial under an indictment for an assault with intent to rape, it was shown that upon a former trial of the defendant for the same offense there was a mistrial; that the woman alleged to have been assaulted was present and testified on the former trial; but that she was not present at the second trial. The return of the officer on the subpoena issued for the woman assaulted showed that she could not be found in the county of her former residence, which was the only residence there was any evidence tending to show she ever had in the State. It was shown that she was not married, and had always resided with her mother. A brother of said witness testified that his mother's home, where his sister lived, had been broken up after the first trial of the defendant, and his mother had moved to Georgia, and that his sister had also gone to Georgia, and that a short time before the present trial, he had received a letter from his sister which was written by her in Georgia, where she had been after the removal from this State. Her brother further testified that after the former trial she stated that she would "rather die than go back to another trial and go through the same ordeal." *Held:* That such evidence showed with requisite clearness that said witness was permanently or indefinitely absent from the State at the time of the trial, and that

133	1
139	79

138	1
140	51
133	1
141	49

133	1
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secondary evidence of her testimony on the former trial was admissible.

3. *Same; admissibility of evidence.*—In such a case, a statement by the woman assaulted, after the former trial, that she "had rather die than go back to another trial and go through the same ordeal," is admissible in evidence in connection with the inquiry as to whether or not her absence from the second trial was of a permanent or indefinite nature.
4. *Assault with intent to rape; charge to the jury.*—On a trial under an indictment for an assault with intent to rape, a charge is not improperly given at the request of the State, which requires the jury to believe certain facts which the State's evidence tended to show beyond a reasonable doubt, and then directs the jury that they are authorized to look at these facts, "if they be facts," in connection with all the other evidence in the case, in determining whether or not the defendant assaulted the person named in the indictment, and if he did so assault her, whether or not at that time he had the intent to have sexual intercourse with her against her will and by force, if necessary to accomplish his purpose, and then directs the jury that if they are satisfied beyond a reasonable doubt that the defendant had assaulted said person, and had at the time such intent, he would be guilty of an assault with intent to ravish.
5. *Same; same.*—On a trial under an indictment for an assault with intent to forcibly ravish, a charge which instructs the jury that "any touching by one person of one person of another in rudeness or anger is an assault and battery, and every assault and battery includes an assault," is free from error and properly given at the request of the State.
6. *Same; general affirmative charge.*—On a trial under an indictment for an assault forcibly to ravish, where there was evidence introduced tending to support every material allegation of the indictment, the general affirmative charge requested by the defendant is properly refused.
7. *Same; charge to the jury.*—On a trial under an indictment for an assault with intent to forcibly ravish, a charge is erroneous and properly refused which instructs the jury that "in a charge to commit rape, the evidence, to be sufficient to justify conviction, must show such acts and conduct on the part of the defendant, that there is no reasonable doubt of his intention to gratify his lustful desire, notwithstanding any resistance on the part of the female," such instruction assuming that the charge contained in the indictment against the defendant was rape.

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8. *Same; same.*—In such a case, the court properly refused the following charge requested by the defendant: "Before the jury can find the defendant guilty of an assault to ravish in this case, the jury must believe from the evidence, beyond all reasonable doubt that it was the purpose of the defendant to fully accomplish his purpose in such a manner and by such means that, if accomplished, it would be rape; that is, there must be an intent to use force, terror, intimidation and the like, necessary to accomplish the purpose;" such charge having omitted an important word and also being unsound, in that it was not essential to the crime of an assault with intent to ravish that the perpetrator should have the intent that his accomplished purpose should be rape.
9. *Same; same.*—In such a case the following charge requested by the defendant was properly refused: "The court charges the jury that the State is required to show by evidence, beyond a reasonable doubt and to a moral certainty, the existence of every fact necessary to establish the guilt of the defendant before he can be convicted. If from all the evidence to be 'proved'; said charge being incomplete on its face,
10. *Abstract charges* are properly refused.

APPEAL from the City Court of Montgomery.

Tried before the Hon. WILLIAM H. THOMAS.

The appellant in this case, Sanford Jacobi, was indicted and tried for an assault upon Lizzie Parker, "a woman, with the intent forcibly to ravish her, against the peace and dignity of the State of Alabama;" was convicted of the offense charged in the indictment, and sentenced to the penitentiary for twenty years.

The appeal in this case is taken from a judgment rendered on the second trial. The first trial resulted in a mistrial. At the first trial Lizzie Parker, the person assaulted, was present and testified as a witness. Lizzie Parker was not present at the second trial, but secondary evidence was introduced as to what she testified upon the first trial. The defendant objected to the introduction of this evidence, and separately excepted to the court's overruling each of his objections. The facts relating to the introduction of the secondary evidence are sufficiently shown in the opinion.

The evidence for the State tended to show that Miss Lizzie Parker arrived in Montgomery at night from

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Butler county, where she had been visiting; that she was on her way to Clanton, in Chilton county, where she resided with her mother; that the train on which she came to Montgomery did not make connection with the train going to Clanton and that it was necessary for her to remain in Montgomery over night; that she had some relatives living in Montgomery and that while talking to a transfer man about going to the house of her relatives her conversation was overheard by the defendant; that the defendant stated to her that he knew her relatives and where they lived, and, after some conversation, induced her to let him go with her to the place of business of her said relative; that after going to the place of business, the defendant and Miss Parker walked to the principal street in Montgomery where he secured a hack; that defendant gave instructions to the hackman to take him and Miss Parker to an assignation house; that upon arriving at said house he went in the room with Miss Parker and attempted forcibly to ravish Miss Parker, and that while so attempting two policemen came to the door of the room where the defendant and Miss Parker were.

The theory of the defendant was that there was no attempt forcibly to ravish Miss Parker, but that what was done by the defendant was the outgrowth of passion and was not seriously objected to by the prosecutrix.

Upon the introduction of all the evidence the court, at the request of the State, gave to the jury two written charges. The second of these charges is copied in the opinion. The first charge was as follows; (1.) "If the jury believe from the evidence beyond a reasonable doubt that in this county and within three years before the finding of this indictment, the defendant, by a false representation of the character of the house, induced Miss Parker to go with him to an assignation house, that, arriving there, he locked the door of the room, took off his coat and put his arm around her and asked her to have sexual intercourse with him; that she refused and moved her seat; that he followed her to the bed when she sat down upon the side thereof, if she did so sit, and again put his arm around her,

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forced her down upon the bed and threw his leg over her, at the same time having his pants unbuttoned and exposing that part of his person, and that while in said room said Jacobi told her that she had to stay with him; that afterwards she got away from the bed and started across the floor, he again caught hold of her and was holding her when there was a knock upon the door, and then he released her, and started to putting on his clothing, the jury are authorized to look at these facts, if they be facts, in connection with all the other evidence in the case in determining whether or not the defendant assaulted Miss Lizzie Parker, and if he did so assault her, whether or not at the time of such assault he had the intent to have sexual intercourse with her against her will and by force, if necessary to accomplish his purpose, and if the jury are satisfied beyond a reasonable doubt that defendant did assault Miss Lizzie Parker and had at the time such intent he would be guilty of an assault with the intent to ravish, and the jury should so find." To the giving of this charge the defendant separately excepted. The defendant also separately excepted to the court's refusal to give the following charge requested by him: "If the jury believe the evidence in this case, they must find the defendant not guilty of the charge of an assault with the intent to ravish, as charged in the indictment."

The defendant also separately excepted to the court's refusal to give each of the following charges requested by him: (1.) "In a charge to commit rape, the evidence, to be sufficient to justify conviction, must show such acts and conduct on the part of the defendant that there is no reasonable doubt of his intention to gratify his lustful desire, notwithstanding any resistance on the part of the female." (2.) "Before the jury can find the defendant of an assault to ravish in this case, the jury must believe from the evidence, beyond all reasonable doubt, that it was the purpose of the defendant to fully accomplish his purpose in such a manner and by such means that, if accomplished, it would be rape; that is, there must be an intent to use force, terror, intimidation and the

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like, necessary to accomplish the purpose." (3.) "The court charges the jury that the State is required to show by evidence, beyond a reasonable doubt and to a moral certainty, the existence of every fact necessary to establish the guilt of the defendant before he can be convicted. If from all the evidence to be proved."

(4.) "If the jury believe from the evidence that there was anything in the conduct of Miss Parker which impliedly gave her consent to the defendant to put his arms around her, and take liberties with her, and he did not put his hands upon her in a rude or angry manner, but under the mistaken belief that she consented thereto, then, upon this state of facts without more the defendant would not be guilty of an assault, or an assault and battery."

J. M. CHILTON and HENRY LAZARUS, A. A. WILEY and JOHN W. A. SANFORD, JR., for appellant.—The admission of such statements and declarations, under the circumstances disclosed by the record in this case, without any attempt to make proof of the fact (if it were a fact) that the prosecuting witness, under the direction or influence of the accused, was removed from the jurisdiction of the court, denied to him not only the protection accorded by the fundamental law of the State when it vouchsafed, in its Bill of Rights, to every citizen charged before its courts with offenses, that "in all criminal prosecutions the accused has the right to be confronted by the witnesses against him," but it violates those substantial and fundamental rights of every American citizen, who enjoys, as his birthright and by right of inheritance, the protection accorded him by the Fourteenth Amendment to the Constitution of the United States, and would have the effect, if countenanced by the judicial department of the government, of depriving him of his liberty without due process of law.—*Holden v. Hardy*, 169 U. S. 387; *Hurtado v. California*, 110 U. S. 516; *Lowe v. Kansas*, 163 U. S. 85; *Civil Rights Case*, 100 U. S. 11; *United States v. Cruikshank*, 92 U. S. 542; *Virginia v. Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339.

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The right of the accused in all criminal proceedings to be confronted with the witnesses against him, as ascertained by the common law and imperishably embodied in the Bill of Rights of Magna Charta, transmitted to and inherited by the American citizen under the protective provisions of the Fourteenth Amendment to the Constitution of the United States, which forbids its denial, has been generally recognized in this country. That there has been legislation in some of the States which, outside and beyond the exceptions which we have discussed, have authorized the admission of secondary proof because of the absence of the witnesses previously examined, from the jurisdiction, or from other causes stated in the statutes; and some jurisprudence independent of statute, which added another exception to the general rules prevailing at the common law, and which limitations alone qualified the substantial and fundamental right of the accused to confrontation with the witnesses against him—is a fact, however reluctantly the admission is made, that we concede to be true. But, whether it be legislation or judicial decision, either or both are open to the charge that they operate an infraction of that substantial and fundamental right guaranteed to all freemen, and, under the test of judicial analysis, measured by Magna Charta and the Constitution of the United States, must fall under the ban of unconstitutional legislation, and, as to judicial decisions, prove obnoxious to the fundamental principles of republican institutions and free government.—Wharton on Criminal Evidence, § 229; Taylor on Evidence, § 474; Cooley's Constitutional Limitations, 387; *Mattox v. United States*, 156 U. S. 240; *Case of Sir John Fenwick*, 13 Howell's State Trials, 537, 579, *et seq.*; *Kirby v. United States*, 174 U. S. 60; *Murray v. Louisiana*, 163 U. S. 101; *Reynolds v. United States*, 98 U. S. 145.

There was not a sufficient predicate laid in this case for the introduction of secondary evidence. It was not sufficiently shown that the witness Lizzie Parker was permanently or indefinitely absent from the State. *Harris v. State*, 73 Ala. 495; *Mitchell v. State*, 114 Ala.

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1; *Floyd v. State*, 82 Ala. 22; *Lowe v. State*, 86 Ala. 49; *Thompson v. State*, 106 Ala. 67; *Percy v. State*, 125 Ala. 52; *Dennis v. State*, 118 Ala. 72.

CHAS. G. BROWN, Attorney-General, for the State.

MCCLELLAN, C. J.—Upon a full and exhaustive consideration of the question on principle and authority, this court in *Lowe v. State*, ruled that “the testimony of a witness on a former trial or prosecution of the defendant, for the same offense, is admissible as evidence against him on a second trial, if the witness is beyond the jurisdiction of the court, whether he has removed from the State permanently or for an indefinite time;” or, to state the ruling perhaps more accurately, that when the witness has removed from the State permanently or for an indefinite time, his testimony on any former trial of the defendant for the same offense may be given in evidence against the defendant on any subsequent trial.—86 Ala. 47. This decision has been often followed and reaffirmed by this court. We are entirely satisfied of its soundness; and we now again follow and reaffirm it.

Whether the predicate for the introduction of secondary evidence reproducing the testimony of Miss Parker on the former trial was sufficiently and properly laid on the last trial, is another important question for adjudication on this appeal. Of course the burden was upon the prosecution to show to the reasonable satisfaction of the trial judge that the witness had left and was out of the State at the time of the trial, and that her absence was of a permanent or indefinite nature. On this matter evidence was adduced before the judge of the city court that process to secure the witness’ attendance had been sent to the counties of Chilton, Jefferson and Butler. Chilton was the county of the witness’ last known residence in this State. The process was returned from that county “not found.” It does not appear in the evidence why process was sent to the county of Jefferson. It, too, was returned “not found.” It appeared that the witness had at some indefinite

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time in the past taught school in Butler county, that after this, she returned there in the summer of 1900 on a visit, and that she was returning from that visit to her home in Chilton county when the assault was committed on her by the defendant. This writ to Butler county had not been returned. The further evidence adduced by the State tending to prove that the witness was permanently or indefinitely beyond the jurisdiction of the court was the testimony of C. E. Thomas, as follows: "That he is a half brother of Miss Lizzie Parker [the absent witness] of Clanton, Alabama; that he resides in Birmingham, Alabama, and has been residing and was so residing there on the 23rd day of June, 1900 [the date of the offense]; that he had not resided with his mother and sister for the past five or six years; that on or about the 23rd day of June, 1900 his mother, who was then residing in Clanton [Chilton county], became quite ill, and wired for witness to come to her bedside; she also summoned his sister, Miss Lizzie Parker, who was on a visit to relatives at Chapman in Butler county, and that she arrived at Clanton on Sunday, the 24th day of June, 1900; that his sister said nothing to him as to what occurred between her and Sanford Jacobi in Montgomery on the previous night, and that he knew nothing of it until he saw and read a publication thereof in the Montgomery Advertiser on Tuesday morning, June 26th, 1900; that he then mentioned the matter to his sister, and she said she was sorry any publicity had been given to the matter as it would tend to injure her; that Miss Lizzie Parker was about twenty-three years old in June, 1900, and lived with her mother in Clanton, Alabama, and that she had no other home than with her mother, and that her mother had no other home in June, 1900; that his mother is a widow; that sometime in the month of January, 1901, his mother broke up her home in Alabama, and sold her house and lot and sold off all her household goods, except a little furniture which has not yet been sold, broke up housekeeping and went to Georgia; that his sister, Lizzie Parker, had gone to Georgia before her, about the 1st of January, 1901; that he had received a letter from his sis-

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ter, Lizzie, which he knew to be in her handwriting, about two weeks before the date of this trial [August 5, 1901], from Buena Vista, Georgia, the envelope containing said letter being postmarked Buena Vista, Ga., that his sister is an unmarried woman and has no home other than that of her mother; that witness at the time she left Alabama, did not say anything about a change of domicile, or about leaving the State permanently, or about acquiring a residence elsewhere than in Alabama; that witness did not know when his sister would return to Alabama, if at all, and that he knew nothing whatever about her intentions upon this subject; that his sister, Miss Lizzie Parker, had testified as a witness for the State at the October term, 1900, on the trial of the case of the State against Sanford Jacobi under this indictment, and that said trial resulted in a mistrial, and that shortly after the former trial, which occurred in November, 1900, he had a conversation with his sister, Lizzie Parker, in reference to said trial, in which she stated: 'I had rather die than to come back to another trial and go through the same ordeal.' On the cross-examination of the witness Thomas, in answer to a question propounded by defendant, as follows: "Are you able to state whether or not your sister's stay in Georgia is indefinite," the witness said he could not. In answer to another question propounded by defendant, witness said he "was not able to state whether or not his sister, Lizzie Parker, was in the State of Alabama at this time or not, nor was he able to say whether or not she had been continuously absent from the State of Alabama from the time she left Clanton in January, 1901, up to the time witness received said letter from some point in Georgia, the envelope of which was postmarked 'Buena Vista, Ga.,' as he had before testified."

The absence of a witness from the State may, for the purpose under discussion, be shown in two ways. It may be made to appear by evidence of a proper and fruitless search for him in every county in which there is any apparent likelihood of his being found, from which an inference may be reasonably drawn that he

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is beyond the jurisdiction of the court; or, without resorting at all to proof of such vain search, it may, of course, be shown directly that he is in another State under circumstances from which it is fairly inferable that his return is contingent, uncertain and speculative.—*Mitchell v. State*, 114 Ala. 1; *Thompson v. State*, 106 Ala. 67, 74. And evidence of this latter character may, of course, be strengthened in respect of the absence from this State by the fact that officers charged under process with the duty of finding him here have failed to find him in the county of his former residence. We do not understand that it was sought to lay the necessary predicate in this case by evidence of the former class, but that the evidence of the issue and return of subpoenas or attachments was intended to be and was considered by the trial court only along with the other evidence as to this witness being in the State of Georgia. None of the evidence as to the writs was of importance except that as to the process which went to Chilton county, the former home of the witness. It did not appear that there was any likelihood of the witness being in the county of Jefferson or in the county of Butler. It was not shown that she had ever been in Jefferson or had any occasion to be there. So the fact that she was not there when the writ was in the hands of the sheriff of that county has no legitimate tendency to show that she was out of the State. As to Butler county it was shown that she had been there temporarily at some unidentified time in the past engaged in teaching a school, but this engagement had ended some considerable time before the offense charged; and that just before the assault upon her she had returned to that county on a visit to relatives, a necessarily temporary occasion which had ended on the day of the assault. There being no likelihood of her presence in Butler county at the time of the trial or just prior thereto there was no occasion to send process to that county for her, the return of not found on such process would not have shown that she was absent from the State, and the failure of the officer to return the writ at all neither authorizes an inference that she was in that county nor goes to weaken other evidence

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tending to show that she was beyond the jurisdiction of the court. But the return of the sheriff of Chilton county that she could not be found in the county of her former residence was pertinent and competent, and entitled to consideration in connection with the other evidence going to show her absence from the State.

The inquiry then being whether the witness was beyond the jurisdiction of the court, that is, beyond the boundaries of the State, we have a return of an officer going to show that she could not be found in the county of her former residence, the only residence there is any evidence tending to show she ever had in the State, and with this the testimony of her brother, that her home had been up to January, 1901, with her widowed mother in Clanton, Chilton county, that in said month this home had been entirely broken up, that the mother sold her house and lot—her home—in Clanton, and all her household effects except a little furniture “which has not yet been sold,”—the inference being that even this remnant was for sale—“broken up housekeeping,” “*broke up her home in Alabama, and went to Georgia,*” that his sister also went to Georgia, that she, the sister, was in Georgia six months after this removal, the *prima facie* presumption being that she had remained there during that time, and was in Georgia two weeks before this trial, the *prima facie* presumption being that she had continued there up to and was there at the time of the trial; and, in effect, that if either the mother or sister had ever returned to Alabama he, the son and brother, knew nothing of it. In addition to this there is evidence of a *motive* on the part of Miss Parker to remove herself beyond the jurisdiction of the court and to remain out of the State indefinitely. She declared to her brother sometime within the period of less than two months intervening between the time of the first trial and her departure to Georgia, that she had rather die than return and go through the ordeal of another trial, her precise language being: “I had rather die than to come back to another trial and go through the same ordeal.” Here there is proof of adequate motive for Miss Parker to leave and to remain indefinitely out

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of the State. Here is proof that the only home she had or ever had in the State was broken up, the house that sheltered her and the household goods sold. Here is proof that the mother, with whom she lived and had always lived, and naturally would live as long as she remained unmarried, having no longer a home in Alabama, nor aught else, so far as the evidence goes, to keep her here or to bring her back, but having thus disposed of all her effects, went to Georgia, and the daughter with her; and *prima facie* that since they went they have there remained, and were there at the time of the trial. Being there under these circumstances there is no warrant for saying their stay is of a temporary nature, but every pertinent consideration points to its indefiniteness, if not indeed to its permanency. So we conclude, in line, we believe, with all of our adjudications, all of which have been attentively considered, that the evidence with requisite clearness showed that the witness, Lizzie Parker, was permanently or indefinitely absent from the State at the time of the trial below, and that the city court properly admitted evidence of her testimony on the former trial.

We have not been inattentive to the objection and exception reserved in the court below to the admission in evidence of the declaration of Miss Parker that she "had rather die than to come back to another trial and go through the same ordeal," nor to the strong argument of counsel in support of that exception. But we are of opinion that the position is not tenable, and that the declaration belongs to that class of expressions of present mental conditions which are competent as exceptional from the rule against hearsay and wholly apart from the doctrine of *res gestae*. There being evidence of Miss Parker's having left and being absent from the State, the further inquiry was whether that absence was of a temporary, or of a permanent or indefinite nature, and this was largely a matter of intention on her part deducible from the considerations and purposes which actuated her in leaving and remaining out of the State. Expressions by her of mental conditions having a bearing on this inquiry which to all appearances were made naturally and sincerely, are admissible as original ev-

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idence. It is of this class of declarations among others that Mr. Greenleaf says: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence and often the only proof of its existence; and whether they were real or feigned is for the jury to determine [the court in this instance]. In the words of L. J. Mellish: 'Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were.' This use of such statements is often spoken of as admissible under the *res gestae* notion, or as 'original' evidence, i. e., not an exception to the Hearsay rule. But this seems clearly unsound. There is one sort of evidence of mental condition which is in truth merely indirect or circumstantial, and, therefore, not subject to the Hearsay rule, e. g., where the sharpening of a knife on the morning before the homicide is taken as evidence of a design to kill, or where the repeated infliction of blows indicates malice, or where running away is taken as indicating fear. But where a distinct assertion in the forms of words predicating a mental state is offered,—as 'I have a pain in my side,' or 'I have the intention of going to town,' or 'I do this for such and such a reason,'—this language is no less an assertion of the existence of a fact than is an assertion of any other sort of fact; in the neat phrase of L. J. Bowen: 'The state of a man's mind is as much a fact as the state of his digestion;' and, therefore, such assertions, being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the Hearsay rule. To admit them then is to make an exception to the Hearsay rule. The different kinds of facts that may be the subject of such assertions may be grouped as follows: (1.) Assertions of pain or other physical condition; (2.) assertions of plan, design, intention; (3.) assertions of feeling.

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emotion, motive, reason; (4) sundry assertions by a testator."

"The existence of a person's design or plan to do a thing is relevant circumstantially to show that he ultimately did it. The presence of the design or plan may be evidence circumstantially by conduct; but the persons' assertion of a present design or plan when made in a natural way and not under circumstances of suspicion, is admissible under the present exception. The *res gestae* notion is often put forward, but improperly, as the justification of this; for the reason already explained such statements must be regarded as admissible by virtue of the present exception. They are generally treated as admissible; though a few courts are found to exclude them, usually through a misapplication of the *res gestae* principle. Statements of intent where the intent becomes material in determining a person's domicile, are sometimes treated as admissible by reason of the *res gestae* or verbal-act doctrine; but it is perhaps better to regard them as governed by the present exception. Statements of intent accompanying an alleged crime are usually admitted according to the *res gestae* doctrine."

"Statements of reason, motive, feeling, emotion are equally included under the general principle, and are admissible so far as they appear to be natural and sincere. For example, where the reason or motive for the departure of certain workmen was a part of the plaintiff's case, the statements of the workmen to the superintendent, when leaving, as to their reason for it, were admitted. * * * So also statements describing one's fear, belief, cheerful or melancholy feelings or the like, physical disgust, hostility or affection, and the like."—1 Green. Ev., §§ 162a-162d. The Supreme Court of Minnesota applied the principle just stated to the declaration of an absent witness that he was then domiciled in another State, in connection with evidence that he had left the State of the forum; and held on evidence very like that in the case before us that the testimony of the witness on a former trial was admissible. *King v. McCarthy*, 54 Minn. 190. In a leading case in Massachusetts, the court held: "Declarations of a per-

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son accompanying a change of his abiding place have always been held competent to explain the change as a part of the *res gestae*; but declarations in such cases are often admissible on a broader ground than as part of the act of removing from one place to another. The intention of the person removing is competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be introduced if it is free from objection in other particulars. The intention may be inferred from acts and conduct, and conduct which tends to show the intention is competent for that purpose. Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show intention."—*Viles v. Waltham*, 157 Mass. 542.

The declaration of Miss Parker showed a state or condition of her mind bearing directly on the inquiry whether she had left the State and whether her absence was temporary, or indefinite or permanent, and tended naturally to show such motive and intent in leaving as supports the conclusion that her absence is at least of an indefinite nature. It was properly received in evidence and considered by the city court, under the authorities and principles to which we have adverted, and is a part of the evidence for our consideration here in determining whether the witness is indefinitely absent from the State. The declaration is a perfectly natural one for Miss Parker to have made under the circumstances, and entirely in line with the disposition to avoid putting herself forward and publicity which she has shown throughout the case. There can scarcely be a doubt that the declaration was a sincere statement of the condition of her mind on the subject of attending another trial of this defendant, a condition which would naturally lead her to leave and remain away from the State.

It may be that the evidence before the judge of the city court other than this declaration was sufficient to establish the necessary predicate for proof of Miss Parker's former testimony. We have not considered it except in connection with the declaration, deeming that

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clearly competent. And if such other evidence was sufficient, the admission and consideration of this declaration by the city court, conceding the action to have been erroneous, would not require or authorize a reversal. This issue upon which the declaration was received was one solely for the determination of the judge. The evidence was addressed to him alone, and not to him and the jury, as, for instance, evidence to lay a predicate for confessions is addressed; and the question here is not whether he received irrelevant or otherwise incompetent evidence, but whether the competent evidence before him proved the preliminary facts involved in the inquiry.—*Burton v. State*, 107 Ala. 68.

The first charge given at the request of the State is not open to the criticisms made by counsel. The charge in its forepart requires the jury to believe the facts hypothesized beyond a reasonable doubt, and then before directing the jury as to any conclusion upon them, the charge declares that the jury are authorized to look at these facts *if they be facts*, in connection with all the other evidence, etc., etc.; thus authorizing a consideration of facts stated hypothetically, not if believed by the jury merely, and not even merely if believed beyond a reasonable doubt by the jury, but if and only if the facts absolutely exist. The charge in this respect is too favorable to the defendant. If it is faulty in singling out certain facts to the exclusion of others, that fault would not require a reversal for the giving of it.

We do not feel that any argument or suggestion is necessary to sustain the proposition of the second charge: "Any touching by one person of the person of another in rudeness or in anger, is an assault and battery; and every assault and battery includes an assault."

That there was evidence before the jury tending to support every material allegation of the indictment there can and is no sort of doubt; and for the court below to have given the affirmative charge requested by the defendant would have been a most palpable and flagrant invasion of the right and exclusive province of

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the jury to pass upon the sufficiency of this evidence.

Charge 1 was properly refused to the defendant for that it assumes that the charge against him was rape; and if this fault were eliminated, its refusal would yet not work a reversal because the substance of it was given the jury in another instruction requested by the defendant.

Charge 2 refused was properly refused both for the reason that an important word intended to be in it is omitted from it, and for the further reason that with the word supplied the charge is unsound. It is not essential to the crime of assault with intent to ravish that the perpetrator should have intended that his accomplished act should be rape. The expression of the charge is inapt and inaccurate.

Charge 3 refused to defendant is elliptical and incomplete on its face.

Charge 4 refused to the defendant was abstract. There was no evidence of any conduct or anything in the conduct of Miss Parker which impliedly or otherwise gave her consent to the liberties taken by defendant with her person. The charge also specifies some facts and excludes others from the jury's consideration.

We find no error in this record, and the judgment of the city court must be affirmed.

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Indictment for Murder.

1. *Organization of jury; effect of court putting back in jury box the names of jurors drawn for special venires.*—While it is improper for the court, after drawing special venires from the jury box for the trial of capital cases to replace in the jury box the names of the jurors so drawn, still if it appears subsequently in the drawing of a special venire for the trial of another capital case, that no one of the persons drawn on

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the previous venires were drawn to try such later case, the improper action of the court in returning to the box the names of the jurors drawn on the previous venires did not deprive the defendant, who was subsequently to be tried, of any legal right, nor did he suffer any special injury by such unlawful act on the part of the court; and, therefore, a motion to quash the special venire subsequently drawn is properly overruled.

2. *Homicide; admissibility in evidence of facts relating to previous difficulty.*—On a trial under an indictment for murder, testimony as to particulars of a former difficulty and relating to occurrences nappening to the deceased and the defendant some two months prior to the homicide, and which have no immediate connection with the fatal attack by the defendant on the deceased, is irrelevant, immaterial, incompetent, and inadmissible in evidence.
3. *Same; admissibility of evidence.*—On a trial under an indictment for murder, where there was evidence tending to show that the deceased had had improper and illicit relations with the defendant's wife, upon the cross examination of the defendant as a witness, a question by the solicitor if he had not heard that the deceased was about to move from the neighborhood is not subject to the objection that the evidence sought to be adduced thereby was immaterial and irrelevant.
4. *Same; evidence as to character of deceased.*—On a trial under an indictment for murder, where the character of the deceased had not been assailed by the defendant, it is not competent for the State to introduce evidence to show that the character of the deceased was good, and that his character for peace and quiet was good.
5. *Same; admissibility of evidence.*—On a trial under an indictment for murder, where the defendant was allowed to prove that he had sworn out a warrant against the deceased and that at the time of the killing the deceased was under bond to appear and answer any charge that might be preferred against him by the grand jury, it is not competent for the defendant to further prove that he had sworn out the warrant "under the advice of counsel."
6. *Homicide; charge as to reasonable doubt.*—On a trial under an indictment for murder, a charge is free from error and properly given at the request of the State which instructs the jury that "a doubt, to acquit the defendant, must be actual and substantial, not mere possibility or speculation. It is not a mere possibility or possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt."

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7. *Same; same.*—In such a case a charge is erroneous and properly refused which instructs the jury that "if they believe from all the evidence in this case that there existed in the mind of the defendant at the time he fired the fatal shot, a reasonable apprehension of imminent danger to his life or limb, then the defendant could lawfully act upon appearances and kill the deceased, if the defendant was without fault in bringing on the difficulty."
8. *Same; same.*—In such a case a charge is erroneous and properly refused which instructs the jury that "if there be a single juror who has a reasonable doubt of the guilt of the defendant, growing up out of the evidence in this case, the jury should acquit the defendant."
9. *Same; same.*—In such a case a charge is erroneous and properly refused which instructs the jury that "a reasonable doubt, is a doubt growing up out of all the evidence in the case for which you can give a reason, and, if there is a reasonable doubt of defendant's guilt, the jury should acquit the defendant."
10. *Same; charge as to self defense.*—On a trial under an indictment for murder, a charge which instructs the jury that "an apprehension of imminent danger caused by acts or demonstrations by the deceased or by threats or words coupled with acts or declarations, is sufficient to justify a deadly assault upon the deceased," is erroneous and properly refused.
11. *Same; same.*—In such a case, a charge as to self defense, which fails to hypothesize a reasonable belief by defendant that he was in imminent peril, is erroneous and properly refused.
12. *Same; charge as to character of deceased.*—On a trial under an indictment for murder, where the character of the deceased had not been assailed by the defendant, but the State had been allowed to prove, against the defendant's objection, that the general character of the deceased for peace and quiet was good, a charge which instructs the jury that they can not consider any evidence showing or tending to show that the deceased was a man of good character for peace and quiet, is free from error and should be given at the request of the defendant.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. A. A. EVANS.

The appellant in this case, Joe Jimmerson, was indicted and tried for the murder of Ed Searcy, was con-

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victed of murder in the second degree, and sentenced to the penitentiary for twenty years.

The trial of the case was had at the fall term of the circuit court. The defendant made a motion to quash the venire drawn and served upon him for the trial of the cause upon the ground that at the preceding spring term of the circuit court several venires had been drawn from the jury box of the county to try the defendant, and also to try other murder cases. That after drawing the names of the jurors from the jury box who were to constitute the special venires the court placed in the jury box the names of the persons so drawn on said special venires and that the special venire drawn for the present trial of the defendant was drawn from the jury box after the names on the former special venires had been restored and returned to such jury box. In connection with this motion were the following facts: At the spring term, 1901, the court drew from the said box two juries to try defendant at that term of the court. He also drew from said box at said spring term two other juries to try murder cases. Both the venires to try defendant at that term were quashed. All four of the juries, or the names of the persons thus drawn as juries, being written on slips of paper, were by the court immediately after each drawing folded up and returned to the jury box. These slips of paper with the names of the jurors were mixed and mingled with the other names in the box and became a part of the contents of the box, in fact they occupied the same position in the box as they did before they were drawn out. The admission made by the defendant in reference to the motions is copied in the opinion. The motion to quash the venire was overruled.

It was shown by the evidence that the killing of the deceased occurred in a public road; that the deceased was going in one direction and the defendant in another, when they met in said road. There was a conflict in the evidence as to what took place at this meeting, the evidence for the State tending to show that the deceased and his wife were walking along the public road, and that the defendant was approaching them,

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carrying a shot gun; that as soon as the defendant was near the deceased he lifted his gun to his shoulder and fired upon him; that the deceased turned from the road into a field and the defendant followed him and fired two more shots at him, and that the last two shots inflicted wounds from which the deceased died.

The evidence for the defendant tended to show that as the defendant was going along the public road he met the deceased and, to avoid a difficulty, changed from the side of the road to prevent meeting the deceased, and deceased also changed so as to put himself immediately in front of the defendant, and when they approached to within a short distance, deceased drew from his right hand pants pocket a pistol and presented and tried to shoot defendant, but his pistol, failing to act, he did not shoot; that defendant thereupon shot twice with his shot gun, loaded with small shot, No. 7; that neither shot struck deceased; that thereupon deceased left the road, made a circuit around the adjacent hill, and was concealed from defendant while beyond the hill; that defendant did not follow deceased, but went up on the bank where he could observe deceased and guard against his approach, and when he got to the top of the bank he observed deceased coming from behind the stumps toward him, still having the pistol and trying to shoot defendant; that thereupon defendant fired twice and deceased cringed and thus received the load in a quartering or diagonal direction in the back and leg on the inside of the leg; that deceased then ran east and fell, and defendant returned to the road. There was also evidence for the defendant tending to show that the deceased had improper and illicit relations with the defendant's wife. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently shown in the opinion.

The court, at the request of the State, gave to the jury the following written charges: (1.) "The court charges the jury that a doubt, to acquit the defendant, must be actual and substantial, not mere possibility or speculation. It is not a mere possibility or possible

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doubt because everything relating to human affairs and dependent upon moral evidence is open to some possible or imaginary doubt." The defendant duly excepted to the court's giving this charge, and also separately excepted to the court's refusal to give each of the following written charges requested by him: (1.) "The court charges the jury that if they believe from all the evidence in this case that there existed in the mind of the defendant at the time he fired the fatal shot a reasonable apprehension of imminent danger to his life or limb, then the defendant could lawfully act upon appearances and kill the deceased if the defendant was without fault in bringing on the difficulty." (2.) "The court charges the jury that if there be a single juror who has a reasonable doubt of the guilt of the defendant, growing up out of the evidence in this case, the jury should acquit the defendant." (3.) "The court charges the jury that a reasonable doubt is a doubt growing up out of all the evidence in the case for which you can give a reason, and, if there is a reasonable doubt of defendant's guilt, the jury should acquit the defendant." (4.) "The court charges the jury that in order to justify the defendant on the ground of self-defense, it is not essential that there should have been any actual or real danger, if there was an apprehension of imminent danger caused by acts or demonstrations of the deceased, or by his threats or words coupled with his acts or demonstrations; and if the jury find from the evidence that the acts or demonstrations or the threats made by deceased against defendant, if such threats and acts were made, coupled with the acts or demonstrations produced in the mind of the defendant a reasonable apprehension or expectation of some serious bodily harm to himself from the deceased, the defendant would be justified if he acted on such appearances of danger and under reasonable apprehension even though it subsequently turned out that there was in reality no danger, and deceased was free from fault in bringing on the difficulty." (5.) "The court charges the jury that if they believe from the evidence that Searcy brought on the difficulty at the time it occurred, and that defendant was not at the time at fault, and if

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they further believe from the evidence that the circumstances were such as to create in the mind of a reasonable man a belief that he was in imminent danger of his life or of great bodily harm, and that he could not flee without adding to his danger, they must acquit the defendant." (6.) "The court charges the jury that in order to justify the defendant on the ground of self-defense it is not necessary that the danger from the deceased to the defendant should have been an actual or real danger, but such as would induce a reasonable person in the defendant's position to believe that he was in imminent danger of great bodily harm or injury from deceased under such appearance the defendant would have the right to act and would not be held accountable, though it should afterwards appear that the indications upon which he acted were wholly fallacious and that he was in no actual peril. The rule of law in such case is this: What would a reasonable person, a person of ordinary caution, judgment and observation, in the position of the defendant, knowing what he knew and seeing what he saw, supposed from the situation and the surroundings. If such reasonable person, so placed, would have been justified in believing himself in imminent danger of great bodily harm, then the defendant would be justified in acting upon such appearances, and would be entitled to an acquittal at the hands of the jury, if he was without fault in bringing on the difficulty." (7.) "The court charges the jury that the jury can not consider any evidence showing or tending to show that the deceased was a man of good character for peace and quiet in determining the guilt or innocence of the defendant." (8.) "Although the jury may find from the evidence that the State has proved the good character of the deceased for peace and quiet in the neighborhood in which he resided, they can not consider this evidence in considering the guilt or innocence of defendant."

LEE & LEE, G. W. PEACH and A. H. MERRILL, for appellant.—The motion to quash the venire should have been sustained. The acts of the judge in returning to

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the jury box the names of jurors that had been previously drawn upon special venires was unauthorized and erroneous.—*Wilkins v. State*, 112 Ala. 55.

The court erred in allowing the State to prove the peaceable character of the deceased, and also erred in refusing to give the charges asked by the defendant relating to the character of the deceased.—*Ben v. State*, 37 Ala. 103; *Danner v. State*, 54 Ala. 127.

The court erred in refusing to give the several charges requested by the defendant.—*Kirby v. State*, 89 Ala. 63; *Robinson v. State*, 108 Ala. 14; *Yeldell v. State*, 100 Ala. 29; *Goodwin v. State*, 102 Ala. 87.

CHAS. G. BROWN, Attorney-General, for the State.

HARALSON, J.—1. There was no error in overruling the motion to quash the *venire* for the trial of defendant, on the grounds therein stated. It may be admitted, that the slips containing the names of the persons composing the three *venires* which were quashed on motion of defendant at the former term of the court,—two of them for the trial of this defendant, and one of them for the trial of another defendant in a capital case,—should not have been restored to the jury box, after said *venires* were quashed, but should have been destroyed. It is unnecessary for us now to determine that question. However that may be, the fact that the slips containing these names were returned to the jury box, did not of itself, as contended by defendant, so taint and corrupt the box, “that it ceased to be a jury box, and no legal jury could [thereafter] be drawn therefrom.” The only ground upon which such a contention can be rested is, that these slips when once drawn from the box could not be legally restored thereto and mingled with the other slips remaining, so as that they could not be thereafter identified, in drawing other *venires* from the box, thereby rendering it possible for the same persons to be drawn and placed on an indefinite number of *venires*. If the judge instead of restoring the slips in the manner alleged, had placed them in a sealed envelope, and thus sealed up had placed them in the box,

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the liability to have repeated *venires* composed of some of the same persons, might have been thus obviated. In this case, the slips were not placed in sealed envelopes, nor tied together; but a list of the names on each *venire* was carefully preserved, and these lists are copied in the transcript as exhibits A. B. and C. to this motion. Furthermore, it was admitted by defendant, on the trial of the motion, "that none of the persons drawn on the previous *venires*, marked A. B. and C. were drawn to try this case," at the term at which it was tried. Under this state of facts, it affirmatively appears, that defendant by the alleged wrongful action of the court in restoring said names to the jury box was not thereby deprived of any legal right, or suffered any special injury.—*Wilkins v. State*, 112 Ala. 55; Code, §§ 4997, 4333.

2. The evidence sought to be introduced by defendant and rejected by the court, made the basis of alleged errors as assigned, from 3 to 11, inclusive, was illegal and entirely irrelevant to the issues in the case. These occurrences, as appear, going into the particulars of a former difficulty and objectionable on that account, were all of a date, more than two months prior to this homicide; they purport to have occurred at the house of deceased and at defendant's own house in his absence, and of which, for more than the length of time specified, defendant was fully informed. They had no immediate connection with the fatal attack by defendant on deceased, and of themselves could neither justify nor palliate defendant's act in killing him, nor shed any legitimate light on the transaction.—*Rogers v. State*, 117 Ala. 9; *Ragland v. State*, 125 Ala. 12.

3. On the cross-examination of defendant as a witness, he was asked by the solicitor, if he had not heard that deceased was about to move from the neighborhood, which question was objected to, because the evidence sought was immaterial and irrelevant,—and not because it was hearsay. Its only possible relevancy or materiality rested on the idea, that defendant hearing that deceased was about to move away, desired to kill him before he left for having defiled defendant's wife;

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or, as tending to show that deceased did not intend to execute his threats against defendant, and that they were idle talk, and for such purposes the evidence was competent.

4. The State was allowed to prove against the objection of defendant, that the general character of the deceased was good, and also, that his character for peace and quiet was good. The objection interposed was, that the character of deceased had not been assailed by defendant. The objection was well taken, and the evidence should not have been admitted. Not a word of evidence had been introduced by defendant, in respect of the general character of deceased, whether good or bad, nor, as to his character for turbulence, violence or revengefulness. The admission of the evidence is sought to be justified, on the ground that there was evidence by defendant tending to show that deceased had, prior to his killing, threatened to kill defendant, and that he had had illicit intercourse with defendant's wife. These did not authorize proof, in rebuttal, of his general character, nor as distinguishable therefrom, of his character for peace and quiet. They were not introduced and were not admissible to prove general reputation, and, of themselves, did not show deceased's character for peace and quiet to be bad. He might have been guilty of both, and yet not have been a turbulent, violent or revengeful man.—*Ben v. State*, 37 Ala. 103; *Eiland v. State*, 52 Ala. 323; *Hussey v. State*, 87 Ala. 122.

5. The defendant was allowed to prove that he had sworn out a warrant against deceased, and he was under bond to appear and answer any charge that might be preferred against him by the grand jury. In connection with this, he offered to prove that he had sworn out the warrant "under the advice of counsel," but on objection that this statement as to the advice of counsel was "immaterial, irrelevant, illegal and incompetent," the court excluded it, and in this it did not err.

6. There was no error in the charge given for the State. The vices of charges from 1 to 3, inclusive, refused for defendant are manifest, and require no discussion.

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Refused charge 4 was faulty. Mere "apprehension of imminent danger caused by acts or demonstrations of the deceased, or by threats or words coupled with his acts or declarations," as stated in the charge, were not sufficient to justify a deadly assault upon deceased, as the charge implies. Moreover, the charge ignores the doctrine of escape.

The 5th charge, to say no more of it, fails to hypothesize the reasonable belief of defendant that he was in imminent peril.

The 6th is subject to the same vice as the 5th. It is besides argumentative and tends to mislead, and ignores the doctrine of retreat.

From what has been said as to the proof of the good character of deceased, it will appear that charges 7 and 8 requested by defendant and refused, should have been given.

For the errors indicated the judgment of conviction is reversed and the cause remanded.

Reversed and remanded.

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Indictment for Murder.

1. *Trial and its incidents; sufficiency of sentence of court on conviction for manslaughter.*—Where, on a trial under an indictment for murder, the jury returns a verdict of guilty of manslaughter in the first degree, fixing the punishment of the defendant at imprisonment in the penitentiary for two years, a sentence of the court which follows the minute entry showing the return of the verdict of the jury, and after reciting that the defendant had nothing to say why the sentence of the law should not be pronounced upon him, then reads: "It is therefore, considered by the court and it is the judgment and sentence of the court that the said defendant [naming him] be imprisoned in the penitentiary of the State of Alabama for a term of two years," is valid and sufficient to show that the judgment of the court was invoked and pronounced upon the guilt of the defendant.

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2. *Same; sufficiency of verdict of jury.*—Where two defendants are jointly indicted and tried for murder, a verdict of the jury that “We, the jury, find the defendants guilty of manslaughter in the first degree, and fix the punishment at two years’ imprisonment,” if defective by reason of ambiguity, such defect is removed by the jury stating, in answer to questions asked by the court in the presence of the defendant, that the word “defendants” included both the defendants; and it is permissible for the court to remove any ambiguity by making such inquiries of the jury,
3. *Homicide; conspiracy; admissibility of evidence.*—On a trial under an indictment for murder, where it is shown that the killing occurred just after a suit between the defendants’ mother and the deceased had been continued, and there was evidence tending to show a conspiracy between the defendants, their father and their brother-in-law to kill the deceased, it is competent for the State to show that just before the continuance of the case, when the defendants’ mother asked for subpoenas for witnesses, the brother-in-law of the defendants stated to the justice before whom the case was pending that he need not issue the subpoenas, that “we intend to fix it up in our own way;” it being shown that just after this statement the deceased walked out of the room with the defendants and their said brother-in-law and the killing occurred a few minutes afterwards.
4. *Same; same; same.*—In such a case, where it is shown that on the night before the killing, the defendants staid at the house of their brother-in-law, who went with them the next day to the trial, and where the brother-in-law, on the direct examination, testified that there was no conspiracy between him and the defendants, it is competent for the State to ask him on cross examination, as to whether or not on the evening of the killing, he told a certain named person that the defendants would be at the place of the trial “and hell would be raised”; and upon the witness denying having made such statement, it is competent for the State, for the purpose of impeachment, to prove by such person that the statement was made by said witness.
5. *Same; same; same.*—In such a case, after one of the defendants had testified that he was at the place of the difficulty as a witness in the suit pending between his mother and the deceased, and knew what the contract was between his mother and the deceased, it is competent for the State, on cross examination, to ask such defendant what was said in the contract; such question being directed to the credibility of witness’ testimony.

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6. *Homicide; charge of court to jury.*—On a trial of two defendants under an indictment for murder, where there is evidence tending to show that there was a conspiracy existing between the defendants to kill the deceased, and that one of the defendants did not shoot at the deceased at all, a charge which instructs the jury that the other defendant had the same right to act in self defense as if he had been first attacked, even though the evidence shows that the deceased had attacked his brother and he had interfered to prevent the deceased from further attacking him, is erroneous and properly refused.
7. *Same; same.*—In such a case, a charge is free from error which instructs the jury that “if you believe from the evidence beyond a reasonable doubt that there was a conspiracy between the defendants and the father to take the life of Vester Henson [the deceased] or do him great injury and the father of defendants fired the fatal shot that killed the deceased, then they would be equally guilty with the father, if the shooting by the father was done in carrying out the conspiracy previously entered into by him.”
8. *Same; same.*—In such a case, it is not error for the court to instruct the jury as a part of its oral charge that “if you believe from the evidence beyond a reasonable doubt that these defendants entered into a conspiracy to kill the deceased, and the deceased was killed with a pistol, you would find them guilty of murder in the second degree, if it was done unlawfully and with malice.”
9. *Same; same.*—In such a case, where there was evidence tending to show that while there were several shots fired at the deceased by the defendants with pistols, that the fatal shot was fired by the father of the defendant from a rifle, and that there was a conspiracy between the defendants and their father to kill the deceased, a charge which instructs the jury that if they believe that the deceased “was killed by a shot from a rifle and not with a pistol, you must acquit the defendants,” is erroneous, in that it pretermits all reference to a conspiracy.
10. *Homicide; charge as to self defense.*—On a trial under an indictment for murder, a charge which instructs the jury that “in order to invoke the doctrine of self defense defendants must have been free from fault in bringing on the difficulty—reasonably free from fault will not do,” is free from error.

APPEAL from the Circuit Court of Walker.

Tried before the Hon. A. H. ALSTON.

The appellants, Adolphus and Walter Stevens, were

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jointly indicted for murder in the second degree for killing one Vester Henson, by shooting him with a pistol; was convicted of manslaughter in the second degree and sentenced to three years' imprisonment in the penitentiary.

The evidence for the State tended to show that on the day of the killing there was to be a trial of a case between the mother of the defendant and Vester Henson, the deceased; that this case was a suit in a justice of the peace court, in which the defendant's mother was suing the deceased for rent; that when the case was called for trial it was continued, but before it was continued, the defendant's mother asked for some subpoenas to be issued for witnesses; that after the case was continued Walter Stevens, one of the defendants, got up in the room where the people was assembled for trial and stepped over to the deceased and said that he wanted to see him; that the deceased walked from the house with Walter and Adolphus Stevens and the defendant; that as they walked along the defendants were cursing at the deceased, and upon Adolphus asking him why he had treated their sister as he had, he denied having done anything wrong towards the defendants' sister; that thereupon Adolphus replied that he intended to whip him for it; that the deceased pulled his knife and cut at Adolphus, who stepped backwards and stumbled over a bush; that thereupon Walter Stevens stepped between them and the shooting commenced; that while the shooting was going on, Jesse Stevens, the father of the defendants, was seen to level his Winchester rifle at the deceased and fire it, and upon the firing of the rifle of Jesse Stevens, the deceased fell. There was conflict in the evidence as to whether the deceased or Walter Stevens fired the first shot.

The evidence for the defendants tended to show that neither of them fired at the deceased until after he had cut at Adolphus Stevens with his knife and cut his collar, and that after cutting at Adolphus Stevens, the deceased cut Walter Stevens' throat and shot him twice; that thereupon Walter Stevens pulled his pistol and began shooting at Henson; that Adolphus Stevens did

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not shoot at all. The defendants, as witnesses in their own behalf, testified that there was no conspiracy between them and their father and John Morgan, their brother-in-law, to kill the deceased.

During the examination of the justice of the peace before whom the case between the defendants' mother and the deceased was pending for trial, and after he had testified that the defendants' mother asked for subpoenas for witnesses, the State asked said witness the following question: "Did John Morgan, a brother-in-law of defendants, say anything about issuing a subpoena in the defendants' presence?" The defendants objected to this question upon the ground that it was irrelevant, immaterial and not binding on the defendants. The court overruled the objection, and the defendants excepted. The witness answered that John Morgan said in the presence of the defendants "By God you need not be issuing these damn old subpoenas. We intend to fix it up in our own way." The court overruled the defendants' motion to exclude this answer, and to this ruling the defendants duly excepted. It was shown by the evidence that John Morgan was a brother-in-law of the defendants and lived at Horse Creek, nine or ten miles away; that the night before the difficulty the defendants came to the house of John Morgan and spent the night, and that he came to the place where the killing occurred with the defendants the next morning.

John Morgan was introduced as a witness for the defendants, and testified that he was present at the shooting, but there was no conspiracy existing between him and the defendants to kill the deceased. The solicitor asked the witness the following question: "Did you tell Andy Pebley the evening before the shooting at Horse Creek that the Stevens boys would be out on the night train and hell would be raised up above the next day?" The defendants objected to this question upon the ground that they were not shown to be present at the time the statement asked about was made, and were not shown to have known anything about the conversation. The court overruled the objection, and

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the defendants duly excepted. The witness answered that he did not make said statement to said Pebley.

The said Andy Pebley was introduced as a witness, and he was asked by the State the following question: "Did John Morgan tell you the evening before the shooting at Horse Creek that the Stevens boys would be out on the night train and hell would be raised up above the next day?" The defendants objected to this question upon the ground that it called for incompetent and hearsay testimony. The court overruled the objection, and the defendants excepted. The witness answered that John Morgan did make said statement at the time specified.

J. Henson, the father of the deceased, when examined as a witness, identified certain clothes which were shown him as the same which were worn by the deceased when he was shot, and stated that they had been in his possession ever since the killing and were in the same condition as they were at the time of the shooting.

A witness, Dan Rhodes, was, during his examination, shown the same clothing, and he identified them as the clothing Vester Henson had on at the time he was shot. Thereupon the State offered the clothing in evidence, and defendants objected on the ground that the clothes had not been properly identified, and that the witness had not been in possession of the clothes. The court overruled the objection, and the defendants duly excepted.

The defendants separately excepted to the following portion of the court's oral charge to the jury: (B.) "In order to invoke the doctrine of self-defense defendants must have been free from fault in bringing on the difficulty, reasonably free from fault will not do." (C.) "If you believe from the evidence beyond a reasonable doubt that there was a conspiracy between the defendants and the father to take the life of Vester Henson (the deceased), or do him great injury, and the father of defendants fired the fatal shot that killed the deceased, then they would be equally guilty with the father, if the shooting by the father was done in carrying out the conspiracy previously entered into by them."

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(D.) "If you believe from the evidence beyond a reasonable doubt that these defendants entered into a conspiracy to kill the deceased, and the deceased was killed with a pistol, you would find them guilty of murder in the second degree, if it was done unlawfully and with malice."

The defendants requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (12.) "I charge you, gentlemen of the jury, that Walter Stevens had the same right to act in self-defense as if he had been first attacked, even though the evidence shows that Vester Henson had attacked his brother, Dolph Stevens, and Walter had interfered to prevent Henson from further attacking Dolph Stevens." (A.) "I charge you that if you believe that Vester Henson was killed by a shot from a rifle gun and not with a pistol, you must acquit the defendants."

The judgment entry was as follows: "This, the 19th day of March, 1902, came C. W. Ferguson, solicitor, who prosecutes for the State of Alabama, and also came the defendants in their own proper persons, and by attorneys, and the said defendants being duly arraigned upon said indictment for their plea thereto says in person, that they are not guilty, issue was joined on this plea, thereupon came a jury of good and lawful men, to-wit: T. B. Hyche and eleven others, who being empanelled and sworn according to law, upon their oaths do say: 'We, the jury, find the defendants guilty of manslaughter in the first degree, and fix the punishment at two (2) years' imprisonment.' The jury being asked by the court in open court in presence of both of the defendants, and their counsel, if the word 'defendants' included both defendants, they answered that the verdict included both defendants, and fixed the punishment of each at two (2) years' imprisonment. And thereafter before the jury was discharged, the defendants demanded a poll of said jury on said verdict, and each of said jurors separately stated that that was his verdict." The judgment entry then proceeded to adjudge the defendants guilty of manslaughter in the first degree, etc.

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There was a motion made by the defendants in arrest of judgment, upon the ground that the verdict returned by the jury was insufficient and uncertain in that it does not state whether both of the defendants or each of them shall suffer one year, so as to make two years, and that it fails to state what punishment each of the defendants shall suffer. This motion was overruled. Subsequently the court rendered its sentence upon the defendants, which was in words and figures as follows: "And now upon this, the 22d day of March, 1902, Walter Stevens, the defendant, being in open court and being asked by the court if he had anything to say why the sentence of the law should not now be pronounced upon him, says nothing. It is therefore considered by the court, and it is the judgment and sentence of the court that the said defendant, Walter Stevens, be imprisoned in the penitentiary of the State of Alabama for a term of two (2) years." A similar sentence was passed upon the defendant, Adolphus Stevens.

D. A. MCGREGOR, J. T. SHUGART and COLEMAN & BANKHEAD, for appellant.—The verdict should be the jury's conclusion on considering each defendant's case by itself. And if guilty against all, it should be in terms which can be construed as several.—Code, § 1036. While several defendants jointly indicted may be jointly tried, the verdict and judgment should be several. A general verdict imposing a joint fine or *punishment* is improper, and a *venire de novo* should be awarded.—22 Encyc. Pl. & Pr., 847.

It is necessary, before evidence of declarations by conspirators can be admitted that a foundation should be laid by proof addressed to the court, *prima facie* sufficient to establish the existence of such a conspiracy. *Owens v. The State*, 74 Ala. 401; *Hall v. State*, 51 Ala. 9; *Hunter v. State*, 112 Ala. 77.

CHAS. G. BROWN, Attorney-General, for the State. The verdict of the jury was sufficient, and the sentence of the court was sufficient.—*Wilkinson v. State*, 106 Ala. 27. The record conclusively shows that the punishment of two years on each of the defendants was

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awarded by the verdict of the jury. It is not essential to the validity or sufficiency of the verdict that it should be in writing.—*State v. Underwood*, 2 Ala. 744; *Meadowcroft v. State*, 163 Ill. 56; *White v. State*, 30 Ala. 520.

The court did not err in its rulings upon the evidence. *Martin v. State*, 89 Ala. 115; *Turner v. State*, 97 Ala. 57; *Elmore v. State*, 110 Ala. 93; *Tanner v. State*, 92 Ala. 1.

TYSON, J.—Upon the authority of *Driggers v. The State*, (123 Ala. 46), and *Wilkinson v. The State* (106 Ala. 28), we must hold that there is enough expressed in the minute entry to show that the judgment of the court was invoked and pronounced upon the guilt of the defendants. If it be conceded that the verdict of the jury as expressed in writing was too uncertain and indefinite, a point we do not decide, to support a judgment of conviction, this defect was cured by what was said by them, in explanation of the written verdict. Since verdicts may be *ore tenus*, the oral statement by the jury of their findings, in connection with the written verdict, was entirely sufficient and eliminated all ambiguity, if it existed, in the latter. This principle is clearly announced in the case of *The State v. Underwood*, 2 Ala. 744, where it was said: "It is not essential to a verdict, that it should be written; the jury may announce it to the court *ore tenus*, or upon paper at their pleasure; and, however rendered, upon the suggestion of the judge, it may be varied by the jury, in its terms, so as to make it speak their intentions. And the change, thus made in the finding, need not be noted in writing, even if it be such as to entirely supersede the verdict." See also *Robinson v. The State*, 54 Ala. 86.

The record affords abundant evidence from which the jury were authorized to infer that there was a conspiracy between the father, the brother-in-law of these defendants and the defendants themselves to kill the deceased. In the light of the results which followed almost immediately upon the declaration of Morgan, the brother-in-law, made in their presence, to the justice of the peace, it was clearly inferable that he had reference

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to defendants as well as to their father who are shown to have participated in the deadly combat.

In view of Morgan's testimony on direct examination that there was no conspiracy between him and the defendants, it was entirely competent for the prosecution for the purpose of impeachment, after proper predicate laid, to prove by Pebley that he (Morgan) made the statement which he denied making. So, too, in view of the inference afforded by the evidence that defendants went from their home, in an adjoining county to the place of the difficulty, for the purpose of provoking a fight with the deceased, and in view of the statement of the defendant, Adolphus, that he was at the place of the difficulty as a witness in a suit pending between his mother and deceased, and knew what the contract was between his mother and deceased, it was competent for the solicitor on cross-examination, to further ask him what was the contract between his mother and the deceased, for the purpose of showing, if he could, that defendant's presence was not for the purpose of giving testimony as a witness, but was in furtherance of the common design to slay the deceased.

The only other exception reserved upon the trial to the admission of evidence, was the action of the court in permitting the State to introduce the clothing worn by deceased when killed. This exception is not urged in argument. Besides, there is manifestly no merit in it, the clothing having been fully identified.

Charge 12 refused to defendants is so clearly bad, no further comment is necessary.

Charge A pretermits all reference to a conspiracy, which the testimony tended to show existed between the defendants and their father to kill the deceased, and was, therefore, properly refused.

There was no error in those portions of the oral charge of the court excepted to.

There being no error in the record, the judgment must be affirmed.

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Johnson v. The State.*Indictment for Murder.*

1. *Organization of jury in capital case; quashing venire.*—When a special venire is ordered in a criminal case, including the regular jurors drawn and summoned for the week of the trial, it is no objection to the special venire and constitutes no ground for quashing it, that the names of persons drawn to complete the panel of petit jurors for the week did not appear upon the special venire served upon the defendant.
2. *Homicide; charge to the jury.*—On a trial for murder, where both the evidence for the State and for the defendant prove that the homicide was committed by the defendant, a charge requested by the defendant is erroneous and properly refused which instructs the jury that “they must believe beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged in the indictment, to the exclusion of every probability of his innocence and every reasonable doubt of his guilt; and that if the prosecution has failed to furnish such measure of proof and to impress the jury with such belief of his guilt, they should find him not guilty.”
3. *Same; same.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that “if the defendant killed the deceased in the heat of passion aroused by sudden anger produced by the resistance of the boy being chastised, then the killing would not be murder unless at the time of the shooting the defendant was prompted by a willful, intentional, malicious and premeditated design to take the life of the deceased, and if every reasonable hypothesis of the innocence of the defendant is not broken down, the crime of murder is not made out.”
4. *Same; same.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that “if they believe from the evidence that the killing in the case was not malicious, then the defendant would not be guilty of murder in either, and that if the killing in this case was without malice, then the defendant would not be guilty of a higher offense than manslaughter in the first

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degree, and that if after considering all the evidence the jury have a reasonable doubt of defendant's guilt of manslaughter arising out of any part of the evidence then they should find the defendant not guilty of any offense."

5. *Same; same.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if defendant was moved by sudden anger or passion provoked by his attempt to chastise his son, the deceased, and the latter's resistance, to fire the gun, but that no malice entered into it, then the defendant could not rightfully be convicted of murder."
6. *Court's oral charge to jury.*—On a trial under an indictment for murder, where the court in its oral charge to the jury correctly instructs the jury as to what constitutes murder in the first degree, the further instruction to the jury that "Murder in the second degree is the unlawful and malicious killing of a human being. The distinction between the two degrees of murder is the absence in murder in the second degree of that deliberation and premeditation required in murder in the first degree is free from error.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. JOHN PELHAM.

The appellant, Van Johnson, was indicted and tried for the murder of Arthur Johnson, was convicted of murder in the first degree, and sentenced to the penitentiary for life.

Before entering upon the trial, the defendant moved to quash the venire. The grounds of the motion and the facts in reference thereto are sufficiently shown in the opinion.

The evidence on the part of the State tended to show that the defendant killed Arthur Johnson, his son, by shooting him with a shot gun; that the deceased left the defendant's house in the month of June, 1901, and came back in July, 1901, on the day he was killed; that as the defendant approached the house on the day of the killing, he saw his son sitting on his front porch; that he walked up to him, carrying a walking stick in his hand, and taking his son by the arm remarked that he had promised to whip him for treating him the way he had done; that the son asked to be allowed to explain, and arose from his chair; that the defendant struck him with the stick; that then the son grappled with the defendant,

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when he placed his hand under the defendant's chin and shoving his head back, released him and ran back through the house into the yard, and then ran around the house; that the defendant followed him and as he entered the door of the second room, he took down a shot gun from over the door, and continued to run after his son; that on getting into the yard, he raised the gun to his shoulder and fired at the son, instantly killing him.

The evidence for the defendant after showing the same facts as disclosed by the State's evidence in reference to the commencement of the quarrel, then tended to show that as the defendant was running after his son with the gun in one hand and the stick in the other, he stumped his foot against a root that was in the yard, and as he fell the gun was accidentally discharged.

The court in its oral charge to the jury, after correctly instructing the jury as to what was murder in the first degree, then continued its instruction as follows: "Murder in the second degree is the unlawful and malicious killing of a human being. The distinction between the two degrees of murder is the absence in murder in the second degree of that deliberation and premeditation required in murder in the first degree. Manslaughter in the first degree is the unlawful and intentional killing of a human being without malice, express or implied, and manslaughter committed under any other circumstances is manslaughter in the second degree." The defendant excepted to this portion of the court's general oral charge. The defendant then requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (11.) "If the defendant killed the deceased in the heat of passion aroused by sudden anger produced by the resistance of the boy to being chastised, then the killing would not be murder unless at the time of the shooting the defendant was prompted by a willful, intentional, malicious and premeditated design to take the life of the deceased, and if every reasonable hypothesis of the innocence of the defendant is not broken down, the crime for murder

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is not made out." (7.) "The court charges the jury that they must believe beyond a reasonable doubt and to a moral certainty, that the defendant is guilty as charged in the indictment to the exclusion of every probability of his innocence and every reasonable doubt of his guilt, and that if the prosecution has failed to furnish such measure of proof and to impress the jury with such belief of his guilt, they should find him not guilty." (18.) "The court charges the jury that if they believe from the evidence that the killing in the case was not malicious, then the defendant would not be guilty of murder in either, and that if the killing in this case was without malice, then the defendant would not be guilty of a higher offense than manslaughter in the first degree, and that if after considering all the evidence the jury have a reasonable doubt of defendant's guilt of manslaughter arising out of any part of the evidence, then they should find the defendant not guilty of any offense." (20.) "If defendant was moved by sudden anger or passion provoked by his attempt to chastise his son, the deceased, and the latter's resistance to fire the gun, but that no malice entered into it, then the defendant could not rightfully be convicted of murder. He might be convicted of manslaughter, but nothing more."

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State. The charges requested by the defendant were erroneous, and therefore, the court did not err in the refusal of them.—*Stoball v. State*, 116 Ala. 460; *Gilmore v. State*, 126 Ala. 31; *Hale v. State*, 122 Ala. 85; *Nicholson v. State*, 117 Ala. 32; *Prior v. State*, 77 Ala. 56; *Field v. State*, 52 Ala. 348; *Smith v. State*, 100 Ala. 4; *Reese v. State*, 90 Ala. 624; *Littlejohn v. State*, 29 So. Rep. 390.

SHARPE, J.—This case was by an order made in the first week of the term set to be tried in the third week of the same term. Before entering on the trial defendant moved "to quash the venire because the names of persons drawn to complete the panel of petit jurors for

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the week do not appear on the list of the *venire* furnished the defendant." The record shows that the names referred to in the motion were those of three persons who had not been drawn as jurors for the week of the trial but who in the organization of regular juries for that week had been summoned and placed on those juries under an order of court to supply the places of persons whose names were on the *venire* for that week and who had either not been summoned, or had for sufficient reason been excused from serving. It is "a copy of the *venire* for his trial" which under section 5273 of the Code must be served on a defendant in a capital case, or his counsel, an entire day before the day set for trial. The *venire* to be formed for a capital case, set for trial as this was, is determined by the statute, which, after providing for the drawing and summoning of special jurors to attend the trial, provides further among other things that "when the day set for the trial is a day of a subsequent week of the term, the special jurors so drawn together with the jurors *drawn* and *summoned* for such subsequent week, shall constitute such *venire*."—Code, § 5005; *Baker v. State*, 22 Ala. 1. The language of the statute excludes the idea which seems to have inspired the motion that the persons mentioned therein belonged on the *venire* for the trial of this case.—(*Green v. State*, 97 Ala. 59. The fact that they were placed on the panel for the week pursuant to the summary order would not have authorized the use of their names in the selection of the jury, and it does not appear that they were so used. It is admitted fact that a copy of the indictment together with a list of the special jurors and of the jurors drawn and summoned for the week of trial, were duly served on defendant, and this shows a strict compliance with the statute.

The charges refused to defendant were each objectionable. Charge 7 was calculated to mislead the jury to believe the evidence adduced by the State alone should show defendant guilty, whereas it was their duty in determining the question of guilt to consider also the testimony introduced by defendant, which in itself proved the homicide was committed by him, if nothing further

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favorable to the State. A similar charge was approved in *Brown's case*, 118 Ala. 111, but the report of that case does not show any evidence proceeded from the defendant's side of the case tending to prove guilt.

Premeditation is not an essential element of murder in the second degree as is assumed by charge 11. That charge and charge 20 each ignore the principle that heat of passion to rebut a presumption of malice once raised, so as to reduce a homicide to manslaughter, must be the result of reasonable provocation. As said in *Prior v. State*, 77 Ala. 56, there must be a concurrence of adequate provocation and ungovernable passion. Whether such provocation existed was under the evidence in this case a question for the jury. Charge 20 also lacks some words in the phrase "could not rightfully convicted of murder" to give the expression meaning.

Charge 18 is obscure of meaning in the absence of some missing word or phrase next after the words "guilty in either."

The court's oral charge, in defining murder in the second degree in connection with what was said in distinguishing the two degrees of murder, was free from error.

No error appearing, the judgment will be affirmed.

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Indictment for Murder.

1. *City court of Montgomery; power as to organization of juries.*

Although the city court of Montgomery is an inferior court, and of statutory creation, it is, in all criminal matters, a court of general jurisdiction; and in the organization of grand and petit juries for the administration of the criminal law, it possesses like powers to those conferred by the statutes upon circuit courts.

2. *Same; organization of special grand jury.*—Section 5000 of the Code, providing for the organization of a special grand jury during the session of the court after the grand jury has been discharged, is not repealed, so far as Montgomery county

188	43
185	21
186	569
185	614

188	43
186	80
186	126

133	43
139	141

123	43
143	46

133	43
144	34

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is concerned, by the act of the General Assembly creating the city court of Montgomery and the local statutes enacted for the selection and drawing of juries for Montgomery county; and where, during the term of the city court, after the regular grand jury for such term has been discharged, an offense is committed in Montgomery county, the city court has authority and power, under said statute (Code, § 5000), to organize a special grand jury for the investigation of the offense.

3. *Same; same.*—In the organization of a special grand jury by the city court of Montgomery, under the provisions of the statute providing therefor (Code, § 5000), where the order commands "the sheriff forthwith to summon eighteen persons possessing the requisite qualifications of grand jurors," it is no objection to an indictment preferred by the grand jury so organized, that the sheriff did not select the names of the persons summoned by him, in obedience to the orders of the court, from the jury list which is required to be kept in the office of the judge of probate by the special jury law for Montgomery county.
4. *Homicide; wife not competent witness for husband.*—On a trial under an indictment for murder, the wife of the defendant is incompetent as a witness for her husband.
5. *Argument of counsel; failure to examine witness; error without injury.*—In the trial of a criminal case, the failure of the defendant to introduce a witness subpoenaed and present, in support of the testimony of another witness examined in behalf of the defendant in reference to a fact wholly immaterial and irrelevant to any issue involved in the trial, is not the legitimate subject of comment by an attorney for the prosecution in his argument to the jury; but the refusal of the court to stop the State's counsel in commenting upon such failure of the defense is error without injury, and, therefore, will not, under the statute (Code, § 4333), work the reversal of the judgment of conviction.
6. *Same.*—Every fact which the testimony tends to prove and every inference counsel may think arises out of the testimony, is legitimate subject of criticism and discussion in the argument of counsel before juries.
7. *Trial and its incidents; order of court clearing court room.* A trial court has not only the power, but it is its duty, in the trial of cases, to prevent demonstrations of approval or disapproval by spectators in the court room; and it is no ground of objection that during the trial of a criminal case, the court had the court room cleared of all spectators, because

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of applause in the audience occasioned by the remarks of counsel during his argument to the jury.

8. *Insanity; burden of proof; reasonable doubt.*—When insanity is set up as a defense in a criminal case, the burden is upon the defendant to establish the insanity to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not justify an acquittal.
9. *Same; what necessary to justify acquittal.*—When insanity is set up as a defense in a criminal case, the defendant must show by a preponderance of the evidence (1) that at the time of the commission of the crime he was afflicted with a disease of the brain, rendering him idiotic or otherwise insane; (2) that being so afflicted he did not know right from wrong as applied to the particular action; (3) if knowing right from wrong, that he had by reason of duress of such mental disease, lost the power to choose between right and wrong, and to avoid doing the act; and (4) that the crime was so connected with such mental disease in the relation of cause and effect as to have been the product of it solely.
10. *Trial and its incidents; right of court to direct form of verdict.* On a trial of a criminal case, where the jury returns a verdict which is irregular in form, it is not error for the court to instruct the jury as to the proper form of the verdict and direct them to retire for the purpose of making the necessary corrections.
11. *Change of venue; opinions of affiants not sufficient.*—Where, on an application for a change of venue, the affidavits filed in support thereof contain the mere expression of the opinion of the parties making them, without stating any distinct, tangible facts upon which such opinions are based, the application is properly overruled, since the mere belief of the party applying for a change of venue, or of the witnesses he introduces, that a fair and impartial trial can not be had in the county in which the indictment is found, is insufficient; facts and circumstances rendering such a trial improbable must appear.

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

The appellant, Sam Lide, was indicted and tried for the murder of A. B. Johnson, was convicted of murder in the first degree and sentenced to the penitentiary for life.

On the 19th day of March, after the regular grand

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jury organized for the February term of the Montgomery city court had been discharged, the court made an order, reciting that it having been made to appear that during the then, February term of the court, and since the regularly organized grand jury had been discharged, A. B. Johnson had been feloniously killed in Montgomery county, and an immediate investigation of the same was proper and necessary, and directing the sheriff to summon "18 persons possessing the requisite qualifications of grand jurors" to attend that term of the court for the purpose of investigating said killing. The clerk, thereupon, on that day, certified and delivered to the sheriff a copy of said order. No jury was drawn by the judge. No order was made by the judge of the city court directing the probate judge to exhibit any list of jurors filed in his office to the sheriff; and without consulting any list prepared by the jury commissioners, or otherwise, the sheriff, in obedience to order set forth above, selected from the general body of the citizens of the county eighteen persons whom he summoned to appear on March 26th. On the last named date, seventeen of these persons so summoned were organized into a grand jury, and on the same day preferred the alleged indictment against the defendant, on which he was tried and convicted, charging him with murdering said Johnson, and such jury was then on that day discharged. The defendant filed a motion to quash the indictment, assigning several grounds therefor. He also filed a plea in abatement raising the same question. The many grounds of the motion to quash, and the many averments in the plea in abatement, assert in substance only two propositions: (1.) The city court of Montgomery is without power to summon a special grand jury to investigate an offense committed during the term of the court and after the discharge of the grand jury regularly organized for the term. In other words, section 5000 of the Code has no application to the city court of Montgomery. (2.) Even if the court had the power to direct the summoning of such grand jury, it was not summoned and selected in the way required by statutes governing the summoning and selecting of grand juries

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in Montgomery county. The motion to quash was overruled, and the defendant duly excepted. The State demurred to the plea in abatement, and the court sustained this demurrer, to which ruling the defendant duly excepted.

The defendant made an application for a change of venue, and in his petition averred the facts relating to the organization of a special grand jury, and also set out the statements made by his wife to him, showing that the deceased had criminally assaulted her, and then averred that T. J. Reynolds, the father of the wife of the defendant, and Oscar Johnson, the brother of the deceased, had colluded together with other persons in procuring a statement from his wife, to the effect that the deceased did not criminally assault her; that this statement had been printed in the daily papers published in Montgomery, which papers had a large circulation throughout the county; that other statements harmful and prejudicial to the defendant had been made in the papers, all of which had led a large number of people throughout the county to believe that the defendant was guilty of the crime of murder; and that, therefore, the defendant could not have a fair and impartial trial in the county of Montgomery. There were affidavits introduced by the defendant in support of this application, and counter affidavits introduced by the State. This application for a change of venue was denied.

The defendant pleaded "not guilty," and "not guilty by reason of insanity."

It was shown by the evidence without conflict that A. B. Johnson was killed by defendant; that the killing occurred on Friday morning in the store of the defendant; that Johnson and the defendant had met and spoken to each other some time before Johnson came into the defendant's store; that after this meeting, at which there were no demonstrations made on the part of either, Johnson walked to the store of the defendant, and after having entered the door and while about half way the store, the defendant picked up his shot gun, which was loaded with buck-shot, and fired upon Johnson, killing him, and that after having fired the fatal shot, the defendant locked his store door, leaving

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the body of Johnson on the floor, and in company with his father-in-law, one T. J. Reynolds, went to the city of Montgomery, where he surrendered himself.

There was evidence on the part of the State that the defendant had deliberately and premeditatedly determined upon killing said A. B. Johnson, and had prepared himself to do so; and that he had made inquiries as to what would be the result of his killing a man, and what was the best way to shoot a man that you were trying to kill.

There was evidence introduced by the defendant tending to show that on Sunday night before the killing Johnson had criminally assaulted and attempted to ravish the wife of the defendant; the defendant as a witness in his own behalf testifying, that his wife told him that while the defendant was away from home Sunday afternoon, she went to the store of the defendant, for the purpose of getting some flour, and while she was there, the said Johnson came into the store, pushed the door to, and while in there criminally assaulted her; that this disclosure and these statements were made by the defendant's wife to him on Monday, and that he did not see Johnson from that time until Friday morning, a short time before the homicide. The defendant further testified that as soon as he was told by his wife of the criminal assault upon her, he went at once to the home of his wife's father, T. J. Reynolds, and after a conference, his wife's father came back to his house with him, and his wife repeated the statements to her father.

T. J. Reynolds was introduced as a witness for the State, and among other things testified that on the Monday night before the killing, the defendant came to his house and stated that his wife had told him that Johnson had criminally assaulted her, and that he wanted the witness to go with him and talk over the matter with his wife; that in compliance with the request of the defendant, he went to his house and asked the defendant's wife if what the defendant had told him was true; that the defendant's wife answered that it was not true; but that the defendant had forced and compelled her to make that statement to him; that John-

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son had never treated her otherwise than as a lady; that when she made the statement to the defendant, she told him at the time that it was not true. There was other evidence introduced on the part of the State tending to show that such statements were made by the defendant's wife, because of threats made by the defendant against her, and by reason of his coercion and compulsion. There was some evidence introduced on the part of the State tending to show that the defendant entertained animosity against the deceased for a year or more before the homicide.

There was evidence introduced on the part of the defendant tending to show that immediately after the killing and during the defendant's incarceration there were symptoms of insanity on the part of the defendant; that he was in a highly nervous condition, very excited and acted strangely at times. It is, however, unnecessary to set out this evidence in detail.

The defendant offered to introduce Mrs. M. E. Lide as a witness in his behalf. The State objected. The bill of exceptions then recites as follows: "Defendant's counsel stated, first, that the witness so offered was competent and offered as a witness under the special plea in the case, and that, second, if not competent for all purposes under the plea, then she was competent and offered as a witness to testify in contradiction of the testimony of witnesses for the State in reference to statements made by her. The court sustained the objection, and refused to permit witness to testify for any purpose in the case, and the defendant then and there duly and legally excepted to the action of the court."

J. W. Killen was introduced as a witness for the defendant, and among other things testified to a statement made by Dr. Oscar Johnson, the brother of the deceased, which tended to show a conspiracy between Johnson and others against the defendant in working up a case against him. Killen testified that at the time of making this statement one Tobe Jones was present. It appeared that Tobe Jones was a witness for the defendant, and was present at the trial and was sworn as

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a witness. The solicitor in his argument to the jury said: "Tobe Jones was here as a witness for the defendant; why wasn't he introduced as a witness by the defendant to substantiate Mr. Killen's statement as to what Dr. Johnson said?"—tending to show that there was a conspiracy in the prosecution of the defendant. The defendant objected to this statement of the witness in his argument as being an improper comment. The court overruled the objection and the defendant duly excepted. The solicitor during his argument to the jury and while referring to the result if the defendant should be acquitted, stated that such acquittal would "allow another murderer to go unwhipped of justice." The defendant objected to the use of these words by the solicitor in his argument and duly excepted to the court's overruling his objection. One of the counsel for the prosecution, during his argument to the jury, and while referring to the killing and after detailing the testimony tending to show the homicide, stated: "This is an assassination. I assert that advisedly." The defendant duly objected to this remark. The court overruled the objection, and the defendant duly excepted.

The bill of exceptions contains the following recital: "During the closing argument there was applause and clapping of hands by persons assembled in the court house. Thereupon the court ordered that the court room be cleared of all persons except those connected with the trial, and with the court and attorneys, which order was promptly executed, and the doors of the court house were closed and locked. The remainder of the trial until after the jury was charged, and retired to consider of their verdict proceeded with the doors so closed, but persons were admitted from time to time during this period on application to the judge, and a gallery overlooking the court room remained open, but the gallery would not hold one-half the people who were excluded from the court room." The defendant objected to this action, and duly excepted to the court's overruling his objection.

Upon the introduction of all the evidence, the court, at the request of the State, gave to the jury the follow-

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ing written charges: (1.) "The jury must be reasonably satisfied that the defendant was afflicted with a disease of the brain at the time of the killing of Johnson before the defendant can be excused on the ground of insanity." (2.) "The jury must be reasonably satisfied by a preponderance of the evidence that the defendant was afflicted with a disease of the brain at the time of the killing of Johnson before the defendant can be excused on the ground of insanity."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by him: (3.) "If from all the evidence in this case, the jury have a reasonable doubt as to the sanity of the defendant at the time of the killing of Johnson, they should find him not guilty, under his plea of insanity." (4.) "If the jury believe from the evidence that the killing of the deceased by the defendant was the offspring or product of mental disease, the verdict of the jury should be 'not guilty by reason of insanity.'" (5.) "If the jury believe from the evidence that the defendant had but recently recovered from an attack of typhoid fever, that when informed that the deceased had attempted to rape his wife, he was greatly excited and could not sleep; that he was highly wrought up; that he wept in the public road and declared 'my life is ruined, my wife is ruined'; that his nervous system was shattered; that an indignity had been committed on his wife by deceased; that he would break down and cry whenever he mentioned the indignity to his wife; that his family had been disgraced; that he seemed indifferent to his own fate; that he constantly bewailed the disgrace which had come upon his family; that he spent sleepless nights in the jail; would walk the floor at night; would talk frequently to himself; pull his hair; had a defective memory; was incoherent and disconnected in his thoughts and speech; was unusual in his manners; was abnormal in his conduct and unnatural in his ways—these symptoms, phases, manifestations and evidences are for the jury to consider in determining whether or not the defendant was insane at the time of the killing." (6.) "If the jury believe from the evi-

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dence that A. B. Johnson assaulted the wife of defendant, and that after defendant learned of such assault he killed Johnson, the first time he saw him; and that when defendant killed Johnson, though he was sane, he was laboring under a passion the reasonable result of the knowledge of such assault, then the jury may consider such fact in determining whether or not defendant, since he first learned of such assault had had sufficient time for his passion engendered by the knowledge of such assault to cool; and if the jury further find from the evidence that there had not been sufficient time for defendant's passion to cool, then they may consider whether or not the absence of such cooling time and the presence of such passion is sufficient to reduce from murder to manslaughter." (7.) "If the jury believe that the deceased attempted to rape the defendant's wife on Sunday evening, that the deceased left home and went into the country some distance from the place where the outrage was attempted and did not return until Friday morning, when the killing was done; that the defendant was not informed of the indignity offered to the defendant's wife until after the deceased had gone into the country, and that defendant had not seen deceased from the time he heard of the attempted rape until Friday morning, when the deceased returned, and that the defendant shot and killed Johnson, the deceased, shortly after seeing him for the first time after deceased's return home—then, upon this state of facts, without more, the jury must determine whether defendant had had sufficient time to cool his anger and indignation; and if the jury believe from the evidence that the sight of the deceased caused the defendant's passions to be suddenly inflamed and aroused, and that while thus suddenly aroused, in the heat of blood, on a sudden impulse, defendant shot and killed the deceased, then the jury, upon this state of facts, would be warranted in finding the defendant not guilty of murder in either the first or second degrees, even though the jury should find that the defendant is not guilty by reason of insanity."

The jury after retiring to consider their verdict, returned to the court room, and in response to a question

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by the court, announced that they had agreed on their verdict. It was handed to the clerk and read by him, and was as follows: "We, the jury, find the defendant guilty of murder in the first degree, and fix the punishment life time in the penitentiary. C. E. Menefee, Foreman." The court said to the jury: "If you intend by this verdict to fix the punishment at imprisonment in the penitentiary, you had better change it so as to read that way exactly. I think it is all right, perhaps, as it is, but a little informal in shape. If that be your intention, write the verdict as follows: 'We, the jury, find the defendant guilty of murder in the first degree, and fix the punishment (this is right so far as it goes) at imprisonment in the penitentiary for life.' Just scratch out the words life time in the penitentiary." The defendant excepted to this further instruction to the jury. The jury having again retired to the jury room and returned to the court room, defendant objected to the verdict of the jury being received after they had been further instructed. The court overruled the objection and received the verdict, and the defendant duly and legally excepted thereto. The verdict so received was as follows: "We, the jury, find the defendant guilty of murder in the first degree, and fix the punishment at imprisonment in the penitentiary for life. C. E. Menefee, Foreman."

A. A. WILEY and WATTS, TROY & CAFFEY, for appellant.—A court has no inherent power to summon a grand jury, and is dependent solely upon the statutes as a source of authority therefor; and further, such statutes must be pursued in order that the jury may be legal and valid. As said by HOPKINS, C. J., in *State v. Williams*, 5 Porter, 135: "Men impanelled as grand jurors who were not selected and summoned to serve the purpose, are as destitute of authority to inquire into offenses and find indictments as if they had voluntarily appeared in court and offered their services as grand jurors. The act of the court in impanelling the grand jury did not supply the want of authority in the sheriff to summon the persons who were placed upon it.
* * * Where men are without authority, no person

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is bound to appear and except to the want of their authority to inquire into his conduct."—*Finley v. State*, 61 Ala. 199, 204-5, 207; *State v. Brooks*, 9 Ala. 12-13; *Cross v. State*, 63 Ala. 40; *O'Byrnes v. State*, 51 Ala. 28-9; *O'Brien v. State*, 91 Ala. 16; 9 Encyc. Law (1st ed.), 2-3; 10 Encyc. Pl., 362, note 1. The city court of Montgomery is one of the inferior courts of law and equity established by the general assembly.—*Sayre v. Winter*, 118 Ala. 1; Acts 1863, p. 121; Acts 1864, p. 165; 1886-87, p. 102; 1869-70, p. 47; 1874-75, pp. 212, 213; 1878-79, p. 418; 1880, pp. 267-68.

Montgomery county has a special law governing all its juries. The provisions governing the present juries are to be found in Acts of 1886-87, p. 190; 1888-89, p. 139; 1890, p. 204; 1892-93, p. 917; 1894-95, p. 34.

By the act of February 21, 1887, "to more effectually secure competent and well qualified jurors in the county of Montgomery," "a complete system is provided for the securing of competent and well qualified grand jurors as well as petit jurors for the trial of all causes by the circuit and city courts to be held in Montgomery county."—*Thomas v. State*, 124 Ala. 48; Acts of 1894-95, pp. 34, 35; Acts 1892-93, p. 917; Acts of 1888-89, p. 140; Acts 1886-87, p. 194. The act includes grand juries, and however inadvertently the legislature may have employed language, the actual words used must be given effect. "It is far better that we should abide by the words of a statute than seek to reform it according to the supposed intention."—*Coe v. Lawrence*, 1 E. & B. 516; *Marwell v. State*, 89 Ala. 161.

Because of the express provision of section 1 of the Act of 1887 and its evident purpose, and its covering the entire field of juries, it is in conflict with section 5000 of the Code, which, it may be conceded, by section 7 of the Act of 1863, was, theretofore, a part of the jury law in Montgomery county; and, therefore, it falls, under the repealing clause of section 18. Because of this express repealing clause, the only question is whether there is a conflict.—*Thomas v. State*, 124 Ala. 48; *Oliver v. State*, 66 Ala. 9. That there is such a conflict

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is evidence.—*Marwell v. State*, 89 Ala. 160; Sutherland Statutory Construction, § 140.

The general law in the Code on this subject of juries provides qualifications for jurors and a method for ascertaining such qualifications. These qualifications, and means of ascertaining the same are different and constitute parts of entirely different systems, each of which is complete. Under the authorities *supra* the special law in this respect must govern. "Where a statute disposes of the whole subject of legislation, it is the only law. Otherwise, we shall have two systems, where one was intended to operate, and the statute becomes the law only so far as a party may choose to follow it. Besides, the mere fact that a statute is made, shows that so far as it goes, the legislature intended to displace the old rule by a new one."—*Barker v. Bell*, 46 Ala. 221. See also *Anderson's case*, 34 Tex. Civ. Rep. 96; *Elkins v. State*, 1 Tex. Ap. 539; *Shuckelford v. State*, 2 Tex. Ap. 385; *Smith v. Bates*, 27 S. W. R. 1044; *Daniels v. Bridges*, 73 Tex. 149; *Wright v. Stuart*, 5 Blackf. (Ind.) 120; *State v. McNamara*, 3 Nev. 70; *State v. Taylor*, 43 La. An. 1132; *State v. Morgan*, 20 La. An. 442; *State v. DaRoche*, 20 La. An. 356; *State v. Cantrell*, 21 Ark. 127. Consequently, even if the city court had power to order a special grand jury, it was not selected and summoned as required by law; the special law made provision for the selection and for ascertaining the qualifications, and yet the sheriff ignored the special law, and only followed the general law. This was as fatal to the validity of the jury and the indictment found by it as if the court had been without authority to order it.

The wife of the defendant in this case was competent as a witness for the purpose for which she was sought to be introduced.—*Wood v. State*, 76 Ala. 39; 29 Amer. & Eng. Encyc. Law, 632; *Gafford v. State*, 125 Ala. 1; *Robison v. Robison*, 44 Ala. 233; *Robertson v. State*, 42 Ala. 513; *Clarke v. State*, 117 Ala. 7.

The defendant's failure to introduce Jones, who, according to the solicitor's statement, was in court, was no ground for an inference unfavorable to defendant, and the comment thereon was improper.—*Brock v.*

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State, 123 Ala. 24; *Coppin v. State*, 123 Ala. 58; *Etheridge v. State*, 124 Ala. 106; *Ragland v. State*, 125 Ala. 12; *Patton v. Rambo*, 20 Ala. 485; *McAdory v. State*, 62 Ala. 154; *Jackson v. State*, 77 Ala. 18; *Carter v. Chambers*, 79 Ala. 223; *Pollak v. Harmon*, 94 Ala. 420; *Bates v. Morris*, 101 Ala. 282; *Haynes v. McRae*, 101 Ala. 319; *Stone v. State*, 105 Ala. 60, 72; *Crawford v. State*, 112 Ala. 1, 10-11, 23; *Nelms v. Steiner*, 113 Ala. 562, 576.

CHAS. G. BROWN, Attorney-General, for the State. The court properly overruled the motion to quash the indictment and properly sustained the demurrer to the plea in abatement.—*O'Byrnes v. State*, 51 Ala. 26; *O'Brien v. State*, 91 Ala. 16; *Ezell v. State*, 102 Ala. 101; *Germolgez v. State*, 99 Ala. 218; *Billingslea v. State*, 68 Ala. 486; *Tanner v. State*, 92 Ala. 51; Cr. Code, § 5269; *Sampson v. State*, 107 Ala. 76; *Linnehan v. State*, 113 Ala. 70; *Kitt v. State*, 117 Ala. 213.

The court should have decided as a matter of law that there was sufficient cooling time between the receipt of this information and the commission of the homicide.—*Rogers v. State*, 117 Ala. 14; *Ragland v. State*, 125 Ala. 14.

When insanity is interposed as a defense to crime, the presumption is that he is sane, and the burden of proof is on the defendant to prove it at least by the preponderance of the evidence and a reasonable doubt does not justify an acquittal by reason of insanity.—*Boswell v. State*, 63 Ala. 397; *Parsons v. State*, 81 Ala. 577; *Maxwell v. State*, 89 Ala. 150; *Martin v. State*, 119 Ala. 150. It must be the result of the duress of mental disease solely.—*Parson's case*, 81 Ala. 577.

The court did not err in its overruling the objection of the defendant to the remark of the solicitor in his argument to the jury.—*Mitchell v. State*, 114 Ala. 5-6; *Cross v. State*, 68 Ala. 476; *Hobbs v. State*, 74 Ala. 41; *Green v. State*, 97 Ala. 60; *Billingsley v. State*, 96 Ala. 126; *McNeil v. State*, 102 Ala. 127; *Cunningham v. State*, 117 Ala. 63-65; *Osborn v. State*, 125 Ala. 106.

The presumption is in favor of the ruling of the court

below on the application for a change of venue, and further it was properly denied on its merits.—*Hawes v. State*, 88 Ala. 37; *Byers' Case*, 105 Ala. 31; *Jackson v. State*, 104 Ala. 1; *Daughdrill v. State*, 113 Ala. 7; *Hussey v. State*, 87 Ala. 125; *Thompson v. State*, 122 Ala. 12; *Rains v. State*, 88 Ala. 91; *Terry v. State*, 120 Ala. 286.

DOWDELL, J.—The city court of Montgomery, though an inferior court and of statutory creation, is, in all criminal matters, a court of general jurisdiction. Acts of 1863, p. 121. Under the act of its creation, and acts amendatory thereof, in the organization of grand and petit juries, in the administration of the criminal law, it possesses like powers to those conferred by statute on circuit courts. By the statute, (Acts, 1869-70, p. 47), there are three regular terms a year, commencing on the third Monday in February, and the second Mondays in July and October. At the February term, 1900, which was convened on the 19th day of that month, a grand jury was regularly empaneled and organized for the term, and on the 3d day of March thereafter, having completed their duties for said term, the grand jury made report to the court, and was on that day finally discharged. On the 9th day of March, and after the discharge of the regular grand jury, and during the term of said court, the homicide for which defendant was tried and convicted was committed. The commission of the homicide being made known to the court, an order was regularly made by the court on the 19th day of March, under section 5000 of the Criminal Code, for the summoning of a special grand jury, and on the 26th day of March pursuant to said order the special grand jury so ordered was duly organized and empaneled. By this grand jury the indictment in this case was found and returned into court. The indictment so found was attacked by the defendant, both by motion to quash and by plea in abatement. The trial court overruled the motion and sustained a demurrer to the plea. It is contended by the appellant that the city court was without authority or power under the law to organize a special grand jury during the term of the court, and after the regular grand jury for the term had been discharged. This contention is based upon the proposition that the

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city court of Montgomery in the organization and empanneling of grand juries is limited in its authority and power by the act of its creation, and the local statutes enacted for the selection and drawing of juries for Montgomery county, and that by these statutes, in so far as the county of Montgomery is concerned, section 5000 of the Criminal Code has been repealed, and that under the local jury law for Montgomery county no authority is given for the organization of a special grand jury during the term of the court and after the regular grand jury for the term has been discharged. The local statutes referred to as regulating the selection and drawing of juries for Montgomery county are, the acts of February 21, 1887, (Acts, 1886-87, p. 190); act of December 4, 1888, amendatory of sections 3 and 9 of the act of February 21, 1887, (Acts, 1888-89, p. 139); act of December 11, 1890, (Acts, 1890-91, p. 204); act of February 21, 1893, (Acts, 1892-93, p. 917); act of December 8, 1894, (Acts, 1894-95, p. 34). It may be conceded, and which is true, that in these several enactments no provision is made for the empanneling of a special grand jury as was done in this case. It is equally clear to our mind that in these special laws, the legislature in all reference to the selection and drawing of grand juries, had in contemplation only grand juries to be regularly organized and empaneled either at the regular term, or for a special or adjourned term of the court, and not in a case of exigency, such as might arise, and which is provided for, under the provisions of section 5000 of the Criminal Code. There is nothing in any of the provisions of the several local acts above mentioned for the selection and drawing of juries for Montgomery county, which either expressly, or by necessary implication, under a reasonable and fair interpretation of these enactments, can be construed as a repeal of section 5000, as to Montgomery county. Section 18 of the act of February 21st, 1887, which contains the repealing clause of this act, after repealing section 4732 of the Code of 1876, "and all other laws and parts of laws, general and special, conflicting with the provisions of this act," further provides, "but all laws now

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in force in relation to jurors, their drawing, selecting, or qualification, not in conflict with this act, are hereby continued in full force and effect." There is nothing in any of the subsequent amendatory acts above referred to, that contains any other repealing clause. Indeed, there is no more conflict between the provisions of this section of the Code and these local statutes, than there is between said section, and other sections of the Code, embraced under chapter 166, articles one, two, three, and four of that chapter, relating to the selection and drawing of juries for regular and special terms of courts. This section, 5000 of the Code, was intended to meet unusual and extraordinary conditions, with a field of operation not embraced in the provisions of either the local statutes in question, or the other sections of chapter 166 of the Code.

It clearly appears from the record that the special grand jury in this case was summoned pursuant to an order of the court made under the provisions of section 5000 of the Code, and was regularly empaneled and organized in strict conformity to the terms of that statute. We think under the principles laid down in the cases of *O'Byrnes v. State*, 51 Ala. 26, and *O'Brien v. State*, 91 Ala. 16, the city court was not without authority and power under the particular circumstances in the case to organize the special grand jury, and its rulings on the motion to quash and the plea in abatement on that ground were free from error.

The order of the court, in the language of the statute, commanded "the sheriff forthwith to summon eighteen persons possessing the requisite qualifications of grand jurors." There is nothing in the record to show that the persons summoned by the sheriff in obedience to this order, did not possess the requisite qualifications of grand jurors, and the presumption is that he discharged his duty in this respect. The fact that the sheriff did not select the names of the persons so summoned by him, from the jury list, which is required to be kept in the office of the probate judge, by the special jury law for Montgomery county, made up by the board of revenue and containing the names of the qualified jurors of said county, did not show that the names of the persons

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summoned were not in fact on said jury list. The law did not require the sheriff to select from the list; it was sufficient if the names of the persons summoned were upon the jury list, and it does not appear that they were not. We do not, however, wish to be understood, by what is said above, as deciding that it is necessary for the qualification of a grand juror drawn under section 5000 of the Code, that his name should be on the list required to be filed in the office of the probate judge under the local jury law for Montgomery county. Moreover, under section 5269 of the Code, no objection can be taken to the indictment by plea in abatement or otherwise, on the ground that any member of the grand jury was not legally qualified.—*Ragland v. State*, 125 Ala. 14; *Kitt v. State*, 117 Ala. 213; *Lincham v. State*, 113 Ala. 70; *Tanner v. State*, 92 Ala. 5; *Sampson v. State*, 107 Ala. 76; *Billingslea v. State*, 68 Ala. 486; *Germolgez v. State*, 99 Ala. 218. Section 5269 further provides, that no objection can be taken to the formation of a special grand jury summoned by direction of the court.

The second question reserved by the appellant that is insisted on in argument of counsel, is the ruling of the court in refusing to allow the wife of the defendant to testify as a witness in his behalf. The incompetency of the wife as a witness for the husband in a criminal prosecution, or of the husband for the wife, is too well settled by the many decisions of this court, to call for discussion.—*Holley v. State*, 105 Ala. 100; *Hussey v. State*, 87 Ala. 135; *Childs v. State*, 55 Ala. 25; *Johnson v. State*, 47 Ala. 33; *Hampton v. State*, 45 Ala. 82; *Miller v. State*, *Ib.* 24; *Williams v. State*, 44 Ala. 28. Other cases might be cited, but these are sufficient to show that the question is no longer an open one in the courts of this State.

The next insistence in argument by counsel for appellant is an exception by the defendant to remarks of counsel for the State in argument before the jury, in commenting on the failure of the defense to examine one Tobe Jones, a witness subpoenaed for the defendant, in support of the testimony of one Killen, another wit-

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ness for the defendant. It is urged in argument here, that the defendant's witness Killen testified to a statement made by Oscar Johnson, tending to show a conspiracy against the defendant in working up a case against him, and that Tobe Jones was present. If such was the purpose of the testimony of the witness Killen, and that is the insistence here, it was, on the undisputed evidence in the case, and on the defendant's testimony, who testified as a witness in his own behalf, wholly immaterial. The statement testified to by Killen, as having been made by Oscar Johnson, could have had no influence upon the jury on the question of the defendant's guilt. The testimony of Killen as to the statement made by Johnson, whether true or false, was altogether unimportant upon the question of the defendant's guilt, and could not possibly have influenced the jury in their finding on this question. The statement testified to by Killen as having been made by Dr. Oscar Johnson to Tobe Jones at Oak Grove on Monday after the homicide, which occurred on Friday preceding, was, to use the language of the witness Killen, "we are doing splendidly, I have busted, or opened, their scheme, and laid the whole thing bare." The evidence without dispute showed that Dr. Johnson, who was a brother of the deceased, had been looking after evidence preparatory for the prosecution of the defendant. What bearing or influence this statement in evidence could have had favorable to the defendant, under either the plea of not guilty or the additional plea of not guilty by reason of insanity, it is impossible to discover, in view of the defendant's own testimony, as well as the other undisputed evidence, as to the facts of the killing. This evidence proved the killing to have been done by the defendant with deliberation and premeditation. The defendant in his own testimony gives in detail the preparation, made by him for the commission of the crime. He gives his reason and motive for the killing—that he had been informed by his wife that the deceased had made a criminal assault upon her on Sunday evening preceding the Friday of the killing, that this information came to the defendant on Monday night. The evidence without conflict shows that he, during the

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three days intervening between the time of his alleged information and the day of the killing, sought to ascertain the probable consequences to himself under the law, if he should kill the deceased. An excuse, which in law can afford no justification for the act, and after lapse of time sufficient for cooling, after receiving information of the assault, can afford no palliation of his crime. And this cooling time was, and is, a question of law, and that three days is sufficient, as a matter of law, cannot be denied.—*Ragland's case*, 125 Ala. 12; *Rogers' case*, 117 Ala. 9. We repeat, that in view of this undisputed evidence, on which the defendant was guilty under the law of murder in the first degree, it is impossible to conceive what influence the testimony of Killen as to the statement made by Dr. Johnson, whether true or false, supported or unsupported by other evidence, could have upon the jury in determining the question of defendant's guilt. For the same reason the evidence of Tobe Jones whether it did, or did not, support that of Killen, was wholly immaterial and of no consequence. Conceding, then, that the court was in error in not arresting, on the motion of the defendant, the State's counsel in commenting on the failure of the defense to examine the witness Jones, we are unable to see that the defendant was thereby prejudiced. Being satisfied that no injury resulted therefrom to the defendant, we feel it our duty under section 4333 of the Criminal Code, not to reverse the judgment of conviction on account of this error.—Code, § 4333; *Erans v. State*, 120 Ala. 269; *Gaston v. State*, 117 Ala. 162; *Fuller v. State*, 117 Ala. 36; *Terry v. State*, 118 Ala. 79; *Wright v. State*, 108 Ala. 60; *King v. State*, 100 Ala. 85.

The record contains other exceptions reserved by the defendant to the remarks made by counsel in argument to the jury, but those exceptions are not insisted on here. It is within the range of legitimate argument for counsel to discuss inferences that may be drawn from the evidence, and to state such inference.—*Cross v. State*, 68 Ala. 476. In *Hobbs v. State*, 74 Ala. 41, it was said by this court, in an opinion by STONE, J.: "Trial courts would be treading on dangerous ground,

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were they to exercise a severe censorship over the line of argument counsel may pursue. They must not allow them to constitute themselves unsworn witnesses, and to state *as facts*, matters of which there is no testimony. But we have gone no further. On the contrary, we expressly said in *Cross' case*, (68 Ala.) that 'every inference counsel may think arises out of the testimony,' is a legitimate subject of criticism and discussion." What was here said was quoted approvingly in *Mitchell v. State*, 114 Ala. 5, 6. We do not think there is any merit in these exceptions.

We see no ground for objection in the court's action in clearing the court-house, because of applause in the audience of remarks of the State's counsel. This action was beneficial rather than prejudicial to the defendant. There was no deprivation of a public trial. What was done, was for a proper and orderly administration of the law. It was not only the power, but the duty of the court, to prevent demonstrations of approval or disapproval by the spectators in the trials of causes, and if need be, to this end, to exclude the offending parties from the court-house.

There were a number of exceptions reserved to the ruling of the court in the admission and exclusion of evidence. None of these exceptions, however, are insisted on in argument of appellant's counsel. We have, nevertheless, considered them, but failed to see wherein any error had been committed by the trial court resulting in injury to the defendant.

On the question of the defendant's insanity, the only evidence offered related to his mental condition after the commission of the homicide, and during the first week or two of his confinement in jail. There was no evidence offered to show insanity at or prior to the time of the killing of the deceased, nor any effort to show any disease of the brain. The evidence tended to show a state of nervousness and mental excitement, nothing more than might naturally follow upon reflecting on the crime he had committed, and the apprehension of the dreaded consequences to come to him under the law. The doctrine of moral or emotional insanity has no place in our system of jurisprudence.—*Walker v. State*,

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91 Ala. 76; *Parsons v. State*, 81 Ala. 577. It must be the result of the duress of mental disease *solely*.—*Parsons v. State*, *supra*. Under the plea of insanity the burden of proof is on the defendant; and what this burden of proof is, is shown in *Parson's case*, *supra*, and stated as follows: 1st. He must show by a preponderance of the evidence, that he, at the time of the commission of the crime, was, as a matter of fact, afflicted with a disease of the brain, so as to be idiotic, or otherwise insane. 2d. He must show by a preponderance of the evidence that being thus afflicted he did not know right from wrong as applied to the particular action. 3d. If being thus afflicted with a disease of the mind, but knowing right from wrong, he must then show by a preponderance of the evidence that by reason of the duress of such mental disease he had so far lost the power to choose between the right and wrong and to avoid doing the act, that his free agency was destroyed; and that at the same time the crime was so committed with such mental disease, in the relation of cause and effect, as to have been the product of it solely. See also, *Boswell v. State*, 63 Ala. 397; *Maxwell v. State*, 89 Ala. 150; *Martin v. State*, 119 Ala. 1; *Ragland v. State*, 125 Ala. 12. Under these authorities the rulings of the court on evidence and charges under the plea of insanity were free from error.

The written charges requested by the defendant were properly refused. These charges were faulty in that they were argumentative, or for giving undue prominence to portions of the evidence and ignoring other evidence in the case.

There was no error in the giving of the written charges requested by the State, nor was there any error in the court's instructing the jury as to the form of the verdict.

There was an application for a change of venue, which was denied by the court. While it is not insisted on here in argument as error, we have given it due consideration, and have no doubt of the correctness of the court's action in refusing it.—*Hawes v. State*, 88 Ala. 37; *Byers v. State*, 105 Ala. 31; *Jackson v. State*, 104

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Ala. 1; *Daughdrill v. State*, 113 Ala. 7; *Thompson v. State*, 122 Ala. 12; *Terry v. State*, 120 Ala. 286.

We find no error in the record from which any injury resulted to the defendant, and the judgment and sentence of the court must be affirmed,

We have been furnished with an additional brief by counsel for appellant, after the foregoing opinion had been written, insisting on exceptions not insisted on in the original argument and brief. We have again gone over and carefully considered these exceptions and fail to see any reason for changing the opinion and the conclusion reached.

Affirmed.

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Indictment for Murder.

1. *Evidence as to character; competency in rebuttal.*—On a trial under an indictment for murder, where the defendant has introduced evidence tending to show that the deceased was a man of violent and bloodthirsty character, it is competent for the State, in rebuttal, to show by a witness that the deceased was "a good, fair, average man."
2. *Indictment for murder; when refusal to give charge requested need not be considered on appeal.*—Where, on a trial under an indictment for murder, the defendant was convicted of manslaughter, the refusal of the trial court to give a charge requested by him which had reference alone to murder need not be considered on appeal; the conviction of manslaughter being an acquittal of murder.
3. *Argumentative and misleading charges* are properly refused.
4. *Homicide; charge as to inference to be drawn from flight.*—On a trial under an indictment for murder, where there is evidence tending to show that after the homicide the defendant fled to another county, a charge is erroneous and properly refused which instructs the jury that "Flight of a defendant, although a circumstance to be considered by the jury in connection with all the other evidence, is evidence

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of a weak and inconclusive character. It may not be evidence of guilt at all if it be shown that there was any other reason for the flight than that of a sense of guilt. Flight may proceed from an unwillingness to stand a public prosecution or from fear of the result, from an inability to explain false appearances, or from the advice of friends to avoid public excitement, and if it proceeded from any one or more of these reasons, then flight is not evidence of guilt at all."

5. *Same; charge as to interest of witness.*—On a trial under an indictment for murder, where the children of the deceased testified as witnesses, a charge is properly refused which instructs the jury that they must weigh the testimony of the children of the deceased "in the light of the fact that they are the children of the deceased, and of the material interest they have in the case."
6. *Same; charge as to conspiracy.*—On a trial for murder, where there is evidence tending to show a conspiracy between the defendant and his two sons who were jointly indicted with him, charges are properly refused which instruct the jury that "there is no evidence that the killing in this case was in pursuance of any conspiracy."
7. *Same; charge of court to jury.*—On a trial under an indictment for murder, where there is evidence tending to show that the defendant was the aggressor, charges are erroneous and properly refused which instruct the jury that the defendant "is warranted in acting more promptly in his own defense when assailed by a person he knows had made threats at taking his life, than when assailed by one who had made no such threats"; and "when assailed by a man of known violent character, than when assailed by a person of peaceable and law-abiding character."
8. *Same; charge as to self-defense.*—On a trial under an indictment for murder, a charge requested by the defendant which does not hypothesize the belief of the defendant that he was in imminent peril at the time of firing the fatal shot, and which does not fully and clearly state the doctrine of imminency of peril and escape therefrom, is properly refused.
9. *Same; same.*—On a trial under an indictment for murder, where there is evidence tending to show that the defendant was the aggressor, a charge is erroneous and properly refused which assumes that the defendant was free from fault in bringing on the difficulty.
10. *Same; same.*—In such a case, a charge is erroneous and properly refused which seeks to impose no duty of retreat on defendant.

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APPEAL from the Circuit Court of Marshall.

Tried before the Hon. JAMES A. BILBRO.

The appellant in this case, D. P. Mitchell, was indicted jointly with his two sons, for the murder of one Dave Thompson by shooting him with a gun, was tried separately and convicted of manslaughter in the first degree and sentenced to the penitentiary for five years.

On the trial the evidence for the State tended to show that as the defendant, in company with his two sons, was passing by the house of the deceased, Dave Thompson, said Thompson ran across the road towards his house, and as he got near his porch, the defendant fired upon him and killed him; that the defendant was near the gate opening into Thompson's yard at the time the fatal shot was fired. There was some evidence on the part of the State tending to show that there was a conspiracy between the defendant and his two sons for the killing of said Thompson; that Dave Thompson had a few days prior to his killing snapped a gun at one of the sons of the defendant.

The evidence for the defendant tended to show that a short time before the killing the two sons of the defendant, who were jointly indicted with him, started towards their homes by Thompson's house; that when they got to Thompson's house they saw his son carrying a gun to him, and that thereupon one of the sons turned back and went to where the defendant was; that thereupon the defendant went with him to Thompson's house, carrying his gun; that as Thompson saw the defendant coming, he ran across the road to his house, calling to his daughter to bring him his gun quickly; that the defendant saw Thompson's daughter carrying the gun to him, and that when Thompson was within ten or fifteen steps from his daughter the defendant fired upon him. There was evidence introduced on the part of the defendant showing that Thompson had made threats against the defendant and his sons and had stated that he was going to kill him. The daughter and his two sons testified as witnesses for the State. There was evidence introduced as to the character of the deceased. This is sufficiently shown in the opinion. There was evidence

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tending to show that after the homicide the defendant fled to Marion county.

Upon the introduction of all the evidence the defendant requested the court to give several written charges, and separately excepted to the court's refusal to give each of said charges. Charges 1 to 7, inclusive, relate to murder, and it is, therefore, unnecessary to set them out in detail. The other charges, to the refusal to give each of which the defendant separately excepted, were the following: (8.) "The court charges the jury that flight of a defendant although a circumstance to be considered by the jury in connection with all the other evidence, is evidence of a weak and inconclusive character. It may not be evidence of guilt at all if it be shown that there was any other reason for the flight than that of a sense of guilt. Flight may proceed from an unwillingness to stand a public prosecution or from fear of the result, from an inability to explain false appearances, or from the advice of friends to avoid public excitement, and if it proceeded from any one or more of these reasons, then flight is not evidence of guilt at all." (10.) "The court charges the jury that in considering the testimony of Maggie, Francis and David Thompson, they must weigh it in the light of the fact that they are the children of the deceased, and of the material interest they feel in the case." (12.) "The court charges the jury that there is no evidence that the killing in this case was in pursuance of any conspiracy." (13.) "The court charges the jury that there is no evidence in this case of any conspiracy between D. P. Mitchell, Lon Mitchell and Lint Mitchell to take the life of the deceased." (14.) "The court charges the jury that a defendant is warranted in acting more promptly in his own defense when assailed by a person who he knows has made threats of taking his life than when assailed by one who has made no such threats." (14½.) "The court charges the jury that the law is that a defendant is warranted in acting more promptly in his own defense when assailed by a man of known violent character than when assailed by a person of peaceable and law abiding character." (15.) "The court charges the jury

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that they have a right to look to the character of the deceased man, and evidence tending to show that the deceased was a man of violent character is proper for their consideration in connection with all the evidence in determining who was the aggressor in the difficulty, and in determining what impression the conduct of the deceased at the time of the killing made upon the mind of the defendant." (16.) "The court charges the jury that if they believe from all the evidence that there were appearances of danger surrounding defendant at the time of the difficulty, then in determining whether such appearances were sufficient to produce in the mind of the defendant a reasonable belief that his life was in danger, the jury should determine the sufficiency of such appearances of danger from the standpoint then occupied by the defendant as he was then surrounded, and if after thus considering the evidence the jury have a reasonable doubt as to whether such appearances were sufficient to produce such a reasonable belief in the mind of the defendant, and if the defendant did not provoke the difficulty and there was no other reasonable means of escape, and if under these circumstances defendant killed the deceased, then this was self-defense and the jury should acquit the defendant." (17.) "While the slayer who is free from fault in bringing on the difficulty must use all possible means of retreat to avoid the fatal act, yet where it is reasonably apparent that he is about to be assailed with a deadly weapon by the deceased in such a manner as apparently to subject him to danger of losing his life, if he is not in a position to avoid it reasonably, the law does not require him to wait until his adversary gains a position equal to his own, and is upon equal terms with him in all respects, but under such circumstances he may lawfully slay his adversary so soon as it appears reasonably from his adversary's acts that a mortal combat is unavoidable." (20.) "The court charges the jury that when defendant started back from Joppa to Thompson's he entertained the purpose of engaging in a difficulty with Thompson, if such should be necessary to protect his son, Lon Mitchell, against an unprovoked and felonious assault by Thompson, if such

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should be made, this would not make the defendant the aggressor in the difficulty." (21.) "The court charges the jury that an intention when the defendant started back from Joppa towards Thompson's to kill Thompson, if it should become necessary to do so in order to protect his son, Lon Mitchell, against a felonious and unprovoked assault at the hands of Thompson, would not make the defendant at fault in bringing on the difficulty."

J. E. BROWN and STREET & ISBELL, for appellant, cited *Martin v. State*, 90 Ala. 602; *Fallin v. State*, 83 Ala. 5; *Evans v. State*, 109 Ala. 11; *Winter v. State*, 123 Ala. 10; *Eiland v. State*, 52 Ala. 322; *Kelso v. State*, 47 Ala. 573; *Sylvester v. State*, 71 Ala. 17; *Karr v. State*, 100 Ala. 4; *Smith v. State*, 88 Ala. 73; *DeArman v. State*, 71 Ala. 351; *Roberts v. State*, 68 Ala. 156.

CHAS. G. BROWN, Attorney-General, for the State, cited *Cobb v. State*, 115 Ala. 18; *Mitchell v. State*, 129 Ala. 23; *Winter v. State*, 123 Ala. 9; *Vaughn v. State*, 130 Ala. 88; *Gilmore v. State*, 126 Ala. 22; *Hall v. State*, 130 Ala. 45; *Frost v. State*, 124 Ala. 25; *Evans v. State*, 109 Ala. 9; *Wilkins v. State*, 98 Ala. 6; *Ford v. State*, 129 Ala. 16.

DOWDELL, J.—On the trial, the defendant introduced evidence tending to show that deceased was a man of violent, bloodthirsty character. The State in rebuttal, introduced a witness, who was asked if he knew the general character of the deceased, who answered, that "he was a good, fair average man." To the question and answer, the defendant objected, because illegal and irrelevant, which objection was overruled. The objection raised in argument is, that the evidence offered is not in rebuttal. It is true the original evidence was as to violent, bloodthirsty character. These traits have some bearing on general character, and it is clear the State had the right to rebut such evidence by showing the deceased's reputation for peace and quiet. It would seem that proof that "he was a good, fair aver-

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age man," would have some tendency in that direction, and to that end, was not wholly illegal and irrelevant. Moreover, it was open to the defendant, to require the witness to explain what he meant by the expression used, if it was supposed it did not tend to show character for peace and quiet.—*Hussey v. State*, 87 Ala. 122; *Eiland v. State*, 52 Ala. 323.

The defendant was convicted of manslaughter in the first degree, on indictment charging him with murder. Charges from 1 to 7, inclusive, requested by defendant and refused, had reference to murder, and do not, therefore, require consideration.—*Evans v. State*, 109 Ala. 11; *Winter v. State*, 123 Ala. 1; *Fallon v. State*, 83 Ala. 5.

Charge 8 requested by the defendant was argumentative and calculated to mislead. There was no error in its refusal. The same charge in substance was condemned on the former appeal.—*Mitchell v. State*, 129 Ala. 23.

Charge 9 is not insisted on, for the reason as counsel state, it "finds substantial duplication in given charge No. 36."

Charge 10. That the children of deceased were competent witnesses for the State, and that they testified under whatever influence their relation to him inspired, was in nowise disputed. That the jury had the legal right to believe or disbelieve them, as they would any other witnesses in the case, nobody denied. The only effect of the instruction was to draw the attention of the jury to the relationship of the witnesses to the deceased, as a matter calculated to throw discredit on their evidence. The charge was a mere argument, which possibly might have been given, but its refusal was equally without error.—*Horn v. State*, 102 Ala. 155.

Charges 12 and 13, as there was some evidence tending to show a conspiracy between the defendant and his sons, were properly refused.

Charges 14, 14½ and 15, in view of the evidence tending to show that defendant was the aggressor, were each bad, if for no other reason, because they ignore any reference to fault on defendant's part in commencing the difficulty. Similar charges were, for the same rea-

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son, condemned on the former appeal.—*Mitchell v. State*, 129 Ala. 23. It may be added, that charge 15 was given substantially in charges 38, 40 and 45.

Charge 16 is faulty. It does not hypothesize the belief of defendant, that he was in imminent peril, nor does it fully and clearly state the doctrine of imminency of peril, and of escape therefrom.—*Evans v. State*, 109 Ala. 12; *Wilkins v. State*, 98 Ala. 1; *Howard v. State*, 100 Ala. 94; *Jackson v. State*, 78 Ala. 47.

Charge 17, as applicable to this case, assumes that the "slayer is [was] free from fault in bringing on the difficulty," and this is sufficient to condemn it. Moreover, it inculcates the repudiated doctrine, that if a defendant is in a position of advantage over his adversary, who is about to assault him, he may hold his position, even to the point of slaying his adversary, and make no effort to retreat, although his danger is not increased thereby.—1 Mayfield Dig., 804, §§ 55, 57.

Charge 18 was rightly refused. It hypothesizes two different moments of time, on which the instructions are based; 1st, when Thompson was crossing the road and running towards his house fleeing from Mitchell to a place of safety; and the 2d, the moment when defendant shot Thompson. As to the first period of time, the instruction is asked, that if Mitchell believed the facts hypothesized, "he had a right to act in the light of this reasonable belief,"—[to do what is not stated, and up to this time, no duty of retreat is put upon him by the charge, but it continues after a comma],—"and if Mitchell was without fault in bringing on the difficulty, and if at the moment he shot [having stood his ground meantime, while Thompson was running for his gun], the appearances were such as to create in his mind, a reasonable belief that he was in danger, etc. * * * and if there was not reasonably apparent to defendant, circumstances as he then was [at the moment he shot], a means whereby he could escape without increasing his danger, then the defendant would not be guilty," etc. The charge is thus open to the construction, that it seeks to impose no duty of retreat on defendant, from the danger appearing at the first period of time men-

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tioned, when Thompson was fleeing towards his house, and not to impose such duty on him, till afterwards, at the moment when he shot, whereas, he was under this duty, at all times from the inception of the difficulty. If not positively erroneous, it is confusing and calculated to mislead.

Charge 19 is not insisted on in argument, and without reference to that fact, was properly refused. It is confused and argumentative.

Those numbered 20 and 21 were also properly refused. If given, their only tendency would have been to mislead. *Non constat* the facts hypothesized, the jury, under all the facts of the case, may have believed that defendant was the aggressor and precipitated the difficulty.

Affirmed.

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Indictment for Murder.

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133	78
4140	26

1. *Organization of jury in capital case; when motion to quash venire should be sustained.*—When a special venire is ordered in a criminal case, including the regular jurors drawn and summoned for the week of the trial, and the list served on the defendant includes the names of some who were drawn but were not summoned as jurors for the week of the trial, the venire should be quashed upon motion made before entering upon the trial.
2. *Dying declarations; admissibility of portions thereof.*—The statement in a dying declaration that the defendant “was trying to shoot me [the deceased] at the same time” is the statement of a collective fact, the weight and credibility of which is for the determination of the jury; and such statement is not subject to the objection that it was merely a statement of an opinion or conclusion of the deceased.
3. *Conspiracy; admissibility in evidence of acts and declarations of co-conspirators.*—In a criminal case, the acts and declarations of any person other than the defendant, in the absence of the defendant, are admissible in evidence against the de-

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fendant, only when there has been introduced evidence, direct or circumstantial, which is *prima facie* sufficient to establish the existence of a conspiracy between the defendant and such other person to commit the offense charged, and there is evidence tending to show that such acts and declarations are in furtherance of the common design to commit such offense.

4. *Argumentative charges* are properly refused.

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. O. KYLE.

The appellant, Robert Smith, was jointly indicted with Frank Orr and Pink Batts, for the murder of Robert Taylor. The appellant in the present case was tried separately and was convicted of murder in the second degree and sentenced to the penitentiary for life.

The defendant was arraigned the first week of the October term, 1901, in the circuit court of Limestone county, and after interposing his plea of not guilty, the court drew from the jury box of the county the names of thirty persons to serve as special jurors, and set October 9, 1901, a day of the second week of the court, as the day for the trial of the cause. The court then ordered that said special jury so drawn and ordered summoned, "together with the petit jurors drawn and summoned for the second week of this term of the court, shall constitute the venire from which the jury to try this cause shall be drawn." It was further ordered that a copy of the special jury, "together with a copy of the petit jury summoned for the second week of the term of the court," and also the copy of the indictment be served upon the defendant at least one entire day before the day set for the trial. Before entering upon the trial the defendant moved the court to quash the venire in this case upon the following ground: Said list of jurors served upon the defendant as the venire to try his cause contained the names of W. N. Knowlster and R. A. Stewart, whose names were drawn to serve as jurors for the second week of the term of the court, but it appears from the return of the sheriff that such jurors were never summoned. It was admitted that

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the facts stated in this motion were true. The court overruled the motion, and the defendant duly excepted.

The State introduced as a witness one William Bass, who testified that before the finding of the indictment, Robert Taylor was shot and killed in Limestone county; that the killing took place at an entertainment given on the plantation rented to said Robert Taylor; that while the entertainment was going on, a pistol shot was heard and Robert Taylor came out from his house and asked who fired the pistol; that after this inquiry was made several times, one Frank Orr stated that he shot the pistol and would shoot Taylor; that Orr then pulled his pistol and Taylor caught hold of it, and while they were engaged in the scuffle over the pistol Frank Orr called out to Pink Batts to come and shoot Taylor; that Pink Batts then ran up with a pistol in his hand, and that while the scuffle was going on Pink Batts shot Robert Taylor. This witness further testified that when Orr had called to Batts to come and shoot Taylor the defendant, Smith, started to the place of the difficulty with a pistol in his hand, and said "Let me get at him;" that this statement was made in a tone of voice loud enough to be heard by Pink Batts; that the witness got before the defendant and prevented him from going to the place of the difficulty. The defendant separately objected to each portion of the testimony of the witness Bass relating to the statements made by Taylor and Orr upon the ground that the defendant was not shown to have been present, and no conspiracy was shown to have existed between the defendant and Orr and Batts. The court overruled each of these objections, and the defendant separately excepted to each of such rulings.

The evidence for the defendant tended to show that at the time of the difficulty when Batts shot Taylor, he, the defendant, did not have a pistol, and was not engaged in the difficulty. It was shown that Batts had, on the day of the present defendant's trial, been convicted.

The State introduced in evidence the dying declaration made by the deceased, which was in words and figures as follows: "I went out last Saturday night to

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stop a fuss going on on the Peet place, I have rented; told Frank Orr he must not have any fuss there and must stop it. I told him (Frank Orr) he must not have any shooting and Frank said 'I will shoot you, God damn you,' then he snatched out his pistol and I grabbed it to keep him from shooting me. Then he called Pink Batts, *alias* Pink Coleman. He (Pink) ran around trying to get a chance to shoot me. I tried to keep Frank between me and Pink to keep Pink from shooting me. Rob Hadley, *alias* Rob Smith, was trying to shoot me at the same time. Pink Batts, *alias* Pink Coleman, ran around tree and shot me." The defendant objected to, and moved to exclude that portion of the statement in which the declaration stated that "Rob Hadley, *alias* Rob Smith, was trying to shoot me at same time," upon the ground that it was merely an opinion or conclusion of the witness, and not the statement of a fact. The court overruled the objection, and the defendant duly excepted.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (12.) "I charge you, gentlemen of the jury, that because Pink Batts has been convicted is not in itself sufficient reason for the conviction of this defendant." (13.) "The conviction of Pink Batts would not in itself justify a conviction of Robert Smith." (14.) "The conviction of Pink Batts would not justify the conviction of Robert Smith unless you believe beyond all reasonable doubt from the evidence in this case that Robert Smith was guilty."

W. C. THACH, for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

TYSON, J.—The special *venire* served on defendant contained the names of W. M. Knowlster and R. A. Stewart. These two persons were drawn as petit jurors for the second week of the court, but not summoned. The order of the court was in conformity with the statute.—Code, § 5005. It required that the defend-

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ant be served with the names only of the petit jurors drawn and summoned for the second week of the court. It was not complied with. The motion to quash the *venire*, having been made before the trial was entered upon, should have been granted.—*Ryan v. The State*, 100 Ala. 108; *Thomas v. The State*, 94 Ala. 74.

The objection taken to that portion of the dying declaration of deceased, which were reduced to writing, that "Bob Hadley *alias* Bob Smith was trying to shoot me at the same time," because it was merely a statement of the opinion or conclusion of the deceased and of his belief and not of a fact, is without merit. It was a statement of a collective fact, the weight and credibility of which was for the jury.—1 Mayfield's Dig., p. 336, § 27.

Since this case must be retried we will refrain from intimating an opinion upon the question whether the evidence was *prima facie* sufficient to establish the existence of a conspiracy between this defendant and the two others jointly indicted with him. The declarations or conduct of these two, not made or done in the presence of this defendant were not competent against defendant unless a conspiracy was shown to have existed between them; and if shown, then only such declarations made or conduct done by them or either of them in furtherance of the common design is competent. The principle upon which such declarations or conduct are admitted is, that the conspirators, by the act of conspiracy "have jointly assumed to themselves the attributes of individuality so far as regards the prosecution of the common design; thus rendering whatever is said or done by any one in furtherance of that design, a part of the *res gestae* and, therefore, the act of all." However, before such evidence can be admitted, it is necessary, that a foundation should be laid by proof addressed to the court, *prima facie* sufficient to establish the existence of such a conspiracy. Such evidence will generally, from the nature of the case, be circumstantial. And when received under the rule, it does not necessarily establish the conspiracy and common guilt of all, but its sufficiency and weight must be

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ultimately determined by the jury.—*McAnally v. The State*, 74 Ala. 9; *Hunter v. The State*, 112 Ala. 77.

We will not review in detail the rulings upon the admission of evidence, since what we have said will doubtless serve as a sufficient guide upon another trial.

The several written charges numbered 12, 13 and 14 were properly refused as being argumentative.

Reversed and remanded.

Richardson v. The State.

Indictment for Murder.

1. *Homicide; admissibility of evidence as to threats.*—On a trial under an indictment for murder, where it is shown that the killing occurred early Tuesday morning, testimony that on the Monday before the killing the defendant threatened to kill the deceased, is admissible as tending to show that the defendant bore malice towards the deceased and was actuated by malice in killing him.
2. *Same; charge as to self defense.*—On a trial under an indictment for murder, a charge seeking to instruct the jury as to self defense, but which ignores the question as to whether the defendant was impelled to shoot the deceased by the belief reasonably engendered by the circumstances that it was necessary to do so in order to save himself from the then impending danger of great bodily harm, is erroneous and properly refused.
3. *Same; general affirmative charge.*—On a trial under an indictment for murder, even though there is no conflict in the evidence, but there is evidence tending to show the defendant bore malice towards the deceased, and was actuated by malice in shooting him, the question as to whether or not the defendant was guilty of murder is one for the determination of the jury, and therefore charges which instruct the jury that if they "believe the evidence they can not find the defendant guilty of murder in the second degree," and that "if the jury believe the evidence in this case they will find the defendant not guilty of murder in

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the second degree," and that "if the jury believe the evidence in this case they will find the defendant not guilty," are erroneous and properly refused.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. A. A. EVANS.

The appellant, Ulus Richardson, was indicted and tried for the murder of Henry Saint George by shooting him with a gun, was convicted of murder in the second degree and sentenced to the penitentiary for twenty-five years.

On the trial of the cause there was no conflict in the evidence as to how the killing occurred, and the facts as shown by the bill of exceptions were as follows: The defendant and one Bishop Drake, the only eye witness to the difficulty, were sleeping in a one room log cabin, the only opening of which was the door. There were no windows and the only mode of ingress and egress was the door. The door was fastened by a stick being propped against the door and one end against the floor. About sun up the defendant and Bishop Drake, who was sleeping with the defendant, was aroused by some one breaking in the door, which was the deceased. The deceased forced an entrance into the room by breaking the stick which propped the door. The deceased entered with a knife open in his hand and said to the defendant: "What did you let them white men have my chairs for," to which the defendant replied, "Because you left them with me to give them if you didn't pay them the debt." The deceased then said to the defendant, "Yes, and now God damn you, I am going to kill you this morning, or you have got to kill me." The defendant said, "Stand back Henry, stand back Henry," at the same time grabbing his gun, which was on a shelf over the head of the bed. The deceased made a motion as if to cut the defendant with his knife when the defendant shot, hitting the deceased in the throat and on the chin, from which wound he died about two days later. As soon as the defendant shot he jumped out of bed and ran down to Sasser's house, about a quarter of a mile off, pursued by the deceased with a stick in his hands.

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The State introduced evidence that the defendant threatened to kill the deceased on Monday night before the difficulty, at about 8 o'clock, to which evidence the defendant duly excepted, and moved the court to exclude the same. The court overruled the said objection and motion, to which action on the part of the court the defendant then and there duly excepted. The defendant introduced evidence that he had made no threats against the deceased previous to the difficulty. The State introduced evidence to show that the house was both the house of the deceased and the defendant. The defendant introduced evidence to show that the house was his and that the deceased had nothing to do with it, but only stayed there some times at the request of the defendant. The defendant introduced evidence of his good character and the bad character of the deceased for peace and quiet.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "I charge you, gentlemen of the jury, that if you believe from the evidence that Henry Saint George broke into the house of Ulus Richardson and assaulted him with an open knife, the defendant was under no duty to retreat, but had the right to defend himself to the extent of killing his assailant." (2.) "If the jury believe the evidence in this case they can not find the defendant guilty of murder in the second degree." (3.) "If the jury believe the evidence in this case they will find the defendant not guilty."

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

SHARPE, J.—Evidence that on the Monday before the killing defendant threatened to kill the deceased, was admissible as tending to show that defendant bore malice towards the deceased and was actuated by malice in shooting him.

Whether in shooting the deceased defendant was acting justifiably in self-defense, was under the whole ev-

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idence a question for the jury depending in part on whether he was impelled to shoot by a belief, reasonably engendered by the circumstances, that it was necessary to do so in order to save himself from a then impending danger of great bodily harm. This inquiry was improperly ignored by the first charge refused to defendant.

The evidence was such as to require the question of whether defendant was guilty of murder to be submitted to the jury, and, therefore, charges 2 and 3 were properly refused.

Other than these, the bill of exceptions presents no question for review, and no error is found in the record proper.

Judgment affirmed.

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Indictment for Murder.

1. *Evidence; admissibility of declarations as part of res gestae.*

When evidence of an act is in itself competent and admissible as a material fact in the case and is so admitted, the declarations accompanying and characterizing such act become and form a part of the *res gestae* of such act, and as such are admissible in evidence as explanatory thereof.

2. *Same; same; case at bar.*—On a trial under an indictment for murder, where it is shown that the defendant went to where the deceased and the defendant's father-in-law were engaged in a quarrel, and that the killing ensued as the result of the defendant taking part in the quarrel, after the introduction in evidence of the testimony of witnesses to the fact that the defendant went to the scene of the altercation between the deceased and his father-in-law, it is competent for the defendant to show the declarations made by him upon his starting to the scene of the altercation; such declarations being part of the *res gestae* of his act in going to the place of the altercation.

3. *Homicide; charge to the jury.*—On a trial under an indictment for murder, a charge is properly refused as being argumen-

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tative which instructs the jury "that any threats made by the deceased towards defendant, if such threats are shown to have been made by deceased, whether recently made or not, may be considered by the jury in connection with all the other evidence in the case, in determining whether or not there was real or apparent danger to defendant at the time he fired the fatal shot."

4. *Same; same.*—On a trial under an indictment for murder, where the evidence showed that while the deceased and the father-in-law of the defendant were engaged in an altercation the defendant approached them, and upon his speaking to the deceased there followed the difficulty which resulted in the latter's death, a charge is erroneous and properly refused which instructs the jury "that if the defendant approached the deceased in a quiet and orderly manner, that deceased replied to him in an angry manner, and knocked defendant down, and that defendant reasonably and honestly believed that deceased struck him with a pistol, and reasonably and honestly believed that deceased had a pistol in his hand as defendant arose after he was knocked down and that his purpose was to do defendant serious bodily harm, and the circumstances were such as to reasonably produce such belief in defendant's mind, situated as defendant was at the time, and no reasonable and safe avenue of escape was open to defendant, then defendant had the right to anticipate his assailant and fire first, and this rule would not be changed even though it should turn out that defendant was mistaken as to his belief that deceased had a pistol in his hand."
5. *Same; same; reasonable doubt.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury "that if, after looking at all the evidence in the case, your minds are left in such a state of uncertainty that you can not say beyond a reasonable doubt whether the defendant was at fault in bringing on the difficulty, and whether he acted upon the well grounded and reasonable belief that it was necessary to shoot and take the life of Arthur York to save himself from great bodily harm or death, or he shot before such impending necessity arose, then this is such a doubt as will entitle the defendant to an acquittal."
6. *Same; same; same.*—In such a case, a charge is erroneous and properly refused which instructs the jury "that if the testimony points in two directions, one to the guilt of the defendant, and the other to his innocence, and both are equally reasonable, they are bound to accept that which points to his innocence and acquit the defendant, if they believe that phase of the testimony."

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7. *Same; same; same.*—In such a case, a charge is erroneous and properly refused which instructs the jury "that if the testimony shows two theories, one tending to the defendant's guilt and the other to his innocence, and both are reasonable, they must acquit the defendant, if they believe the theory tending to his innocence."

APPEAL from the County Court of Cleburne.

Tried before the Hon. T. J. BURTON.

The appellant, J. D. Campbell, was indicted and tried for the murder of Arthur York, was convicted of murder in the first degree, and sentenced to the penitentiary for life.

The uncontroverted evidence was that the homicide occurred on the premises of one W. S. Pruett, in Cleburne county, at a public sale; that Burrell Messer was the father-in-law and that Bud Messer was a brother-in-law of defendant; that the homicide occurred near a barn or crib on the premises of said Pruett, and some 40 or 50 yards from a dwelling house on said premises; that defendant Campbell, walked from about said dwelling house to the point where the homicide occurred, and as he came to said point the deceased and Burrell Messer were engaged in a quarrel; that defendant Campbell walked up and spoke to the deceased, and that a few words were passed between them, when deceased knocked Campbell down, and that Campbell, as he arose, and before he was fairly erect, shot deceased through the head with a pistol, from the effect of which wound he died in a short while, without ever speaking.

There was some conflict in the testimony as to what was said by the defendant Campbell and the deceased, after Campbell walked up to where deceased and Messer were quarreling, and before deceased knocked him down. The testimony on behalf of the State tended to show that Campbell walked up and participated in the quarrel between deceased and Messer, and that he used very vile and opprobrious epithets toward the deceased, before deceased struck him; while the testimony on behalf of defendant Campbell tended to show that he approached the deceased in a quiet and orderly manner, and quietly asked deceased not to curse the "old man," meaning Burrell Messer; that deceased

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then cursed Campbell and said to him: "Do you take it up?" that Campbell replied: "Only that much, I don't want you to curse the old man"; and that thereupon the deceased struck Campbell on the head, knocking him down; that as he arose he drew his pistol, a self-acting one, from his pocket and shot deceased. The testimony on behalf of defendant also tended to show that deceased had his pistol, or a pair of knucks in his hand with which he struck defendant and that he had his pistol in his hand, as defendant was rising and when he fired the fatal shot.

The evidence on behalf of the State tended to show that deceased had nothing in his hand when he struck defendant, or when the shot was fired, and that his pistol was taken from his pocket by his friends after the fatal shot was fired. It was shown by the testimony on behalf of defendant that deceased had made some threats towards defendant a year or so before, but it was not shown that these threats had been communicated to defendant prior to the homicide. The other facts of the case are sufficiently stated in the opinion.

The defendant requested the court to give to the jury, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "The court charges the jury that any threats made by deceased towards defendant, if such threats are shown to have been made by deceased, whether recently made or not, may be considered by the jury in connection with all the other evidence in the case in determining whether or not there was real or apparent danger to defendant at the time he fired the fatal shot." (4.) "The court charges the jury that if the defendant approached the deceased in a quiet and orderly manner, that deceased replied to him in an angry manner, and knocked defendant down, and that defendant reasonably and honestly believed that deceased struck him with a pistol and reasonably and honestly believed that deceased had a pistol in his hand as defendant arose after he was knock down and that his purpose was to do defendant serious bodily harm, and the circumstances were such as to reasonably pro-

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duce such belief in defendant's mind situated as defendant was at the time, and no reasonable and safe avenue of escape was open to defendant, then defendant had the right to anticipate his assailant and fire first, and this rule would not be changed even though it should turn out that defendant was mistaken as to his belief that deceased had a pistol in his hand." (15.) "The court charges the jury that if after looking at all the evidence in the case your minds are left in such a state of uncertainty that you can not say beyond a reasonable doubt whether the defendant was at fault in bringing on the difficulty and whether he acted upon the well grounded and reasonable belief that it was necessary to shoot and take the life of Arthur York to save himself from great bodily harm or death, or he shot before such impending necessity arose, then this is such a doubt as will entitle the defendant to an acquittal." (23.) "The court charges the jury that if the testimony points in two directions, one to the guilt of the defendant, and the other to his innocence, and both are equally reasonable, they are bound to accept that which points to his innocence and acquit the defendant, if they believe that phase of the testimony." (25.) "The court charges the jury that if the testimony shows two theories, one tending to the defendant's guilt and the other to his innocence, and both are reasonable, they must acquit the defendant, if they believe the theory tending to his innocence."

B. B. & W. H. BRIDGES and MERRILL & MERRILL, for appellant.—Whenever any act of a party is admissible in evidence, and is admitted, any declarations of the party, made at the time of the act, and tending to explain or shed light on the act, are admissible as part of the *res gestae*.—*Williams v. State*, 105 Ala. 96; *Harris v. State*, 96 Ala. 24; *Martin v. State*, 77 Ala. 1; *Burton v. State*, 115 Ala. 1; *Kilgore v. Stanley*, 90 Ala. 523; *Yarbrough v. Moss*, 9 Ala. 382; *M. & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Hamilton v. State*, 10 Am. Rep. 22; 1 Greenleaf on Evidence, § 108; 21 Am. & Eng. Ency. Law (1st ed.), 99; *Masterson v. Phinizy*, 56 Ala. 336; *Tesney v. State*, 77 Ala. 33.

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Under the statute as it now exists, and as it has been construed by this court, a charge requested, asserting a correct legal proposition, and which is not abstract or misleading, should be given, and its refusal is error. Code, 1896, § 3328; *Gibson v. State*, 89 Ala. 121; *Brown v. State*, 118 Ala. 111; *Eiland v. State*, 52 Ala. 322; *Orr v. State*, 117 Ala. 69; *E. T. V. & G. R. R. Co. v. Bayliss*, 77 Ala. 69; *Polly v. McCall*, 37 Ala. 20; *Harris v. State*, 96 Ala. 24.

On the trial of a party charged with murder, evidence of uncommunicated threats made by decedent against defendant is admissible in evidence, when it is shown that at the time of the homicide, deceased was making some demonstration, or overt act in consummation of such threats, and is competent to be considered by the jury in determining the *quo animo* of such demonstration, and who was the aggressor, and whether there was real or apparent danger to defendant at the time of the homicide.—*Roberts v. The State*, 68 Ala. 156; *Johnson v. The State*, (Miss.), 5 So. Rep. 95; *Holler v. The State*, 10 Am. Rep. 74.

CHARLES G. BROWN, Attorney-General, for the State. The court did not err in refusing to permit the defendant to prove the declarations made by him to the witness Lovejoy.—*Harris v. State*, 96 Ala. 24; *Tesney v. State*, 77 Ala. 33; *Martin v. State*, 77 Ala. 1; *Kilgore v. Stanley*, 90 Ala. 523. The court did not err in refusing the charges requested by the defendant.—*Gilmore v. State*, 126 Ala. 20; *Fountain v. State*, 98 Ala. 40; *Stone v. State*, 105 Ala. 60; *Bondurant v. State*, 125 Ala. 31; *Henderson v. State*, 77 Ala. 77; *Compton v. State*, 110 Ala. 24.

DOWDELL, J.—The defendant set up the plea of self-defense. The evidence was in conflict as to who was the aggressor. The evidence without dispute showed that the killing occurred at the home of one Pruett, on the occasion of a public sale, where a good many people were attending; that on said occasion the deceased and one Burrell Messer, who was the father-in-law of

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the defendant, got into a quarrel, and were at the time near a crib a short distance from the dwelling house, and that the defendant was not present at the commencement of the quarrel between Messer and deceased, but came upon the scene later, and while the two were still engaged in the altercation of words, and came from the direction of the dwelling house. One Lovejoy was examined as a witness in behalf of the defendant, and testified, that witness and defendant were standing near the dwelling house, some distance from where deceased and Messer were, and were engaged in conversation relative to the settlement of a business matter between witness and the defendant, that from the place where witness and defendant were standing, witness could not see Messer and deceased near the crib. The defendant offered to prove by this witness, what he, the defendant, said, when he started to where Messer was, near the crib, which was objected to by the State, and the objection was sustained. It was stated to the court what the witness would testify as to the declaration of the defendant when he started to where Messer and the deceased were near the crib, and where the defendant became involved in the difficulty resulting in the death of the deceased, which tended to show that the defendant started to where Messer was, for the purpose of getting some money changed, with which to pay a debt to the witness. It is contended by counsel for defendant, that his going to the scene of the altercation between his father-in-law, Messer, and the deceased, and after the quarrel between the two had begun, being shown in evidence, it was competent for him to show his declarations upon starting, as a part of the *res gestae* of his act in going to where Messer and the deceased were. We think this contention is sound. Whenever evidence of an act is in itself competent and admissible as a material fact in the case, and is so admitted, the declarations accompanying and characterizing such act become and form a part of the *res gestae* of the act, and as such, are competent and admissible in evidence as being explanatory of the act. The sincerity of such declarations, or what weight may be given to the same, is a question for the jury. The court erred in exclud-

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ing this testimony.—*Harris v. State*, 96 Ala. 24; *Tesney v. State*, 77 Ala. 33; *Martin v. State*, 77 Ala. 1; *Kilgore v. Stanley*, 90 Ala. 523; 1 Gr. Ev., § 108; 21 Am. & Eng. Ency. Law (1st ed.), 99.

Other exceptions reserved to the rulings of the court on the admission and exclusion of evidence are without merit. Moreover, the same are not insisted on in argument.

There were a number of written charges requested by the defendant, the greater part of which were given by the court. Of the written charges refused those numbered 1, 4, 15, 23, and 25, only, are insisted on in argument. Charge 1 was properly refused as being argumentative. The remaining charges above mentioned are ~~possessed~~ of infirmities rendering them bad, and for which similar charges have been condemned in one or more of the following cases: *Gilmore v. State*, 126 Ala. 20; *Fountain v. State*, 98 Ala. 40; *Stone v. State*, 105 Ala. 60; *Roden v. State*, 97 Ala. 54; *Bondurant v. State*, 125 Ala. 31; *Compton v. State*, 110 Ala. 24. These charges, in postulating an acquittal upon self-defense, are either faulty in that they are argumentative, or in the omission of some one of the constituent elements of self-defense.

The charges refused which are not insisted upon in argument, need no comment on their defects.

For the error pointed out the judgment of the trial court will be reversed and the cause remanded.

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Indictment for Murder.

1. *Homicide; verdict of jury; sufficiency thereof.*—A verdict of the jury that "We, the jury, find the defendant guilty of manslaughter and fix the punishment at five years in the penitentiary," is sufficient to show that the jury found the defendant guilty of manslaughter in the first degree, and is sufficient to sustain a sentence of imprisonment in the penitentiary for five years.

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2. *Organization of jury; fact that one of the jurors drawn is dead no ground for quashing venire.*—The fact that one of the persons whose name was drawn and placed upon the venire for the trial of a capital case was dead at the time the venire was drawn, constitutes no ground for quashing the venire; there being no evidence that the death was known to the court at the time of the drawing of the jury, or of any fraud by which the name of such dead juror was placed upon the list.
3. *Secondary evidence; when admissible.*—Before secondary evidence of what an absent witness had testified on the preliminary hearing is admissible in evidence, a proper predicate must be laid by showing that such witness was either permanently out of the State, with no intention of returning, or was indefinitely beyond the control of the court.
4. *Homicide; charge as to freedom from fault.*—On a trial under an indictment for murder, charges which do not hypothesize freedom from fault in bringing on the difficulty, or ignore the question of freedom from fault in bringing on the difficulty, are erroneous and properly refused.
5. *Same; charge to the jury.*—On a trial under an indictment for murder, a charge which withholds from the jury the right to determine whether the facts hypothesized were sufficient to show imminent peril to life or limb, is properly refused.
6. *Same; same.*—In the trial of a criminal case, charges which are argumentative, or which lay stress on a particular fact to the exclusion of others, or which are invasive of the province of the jury, are properly refused.
7. *Same; charge as to reasonable doubt.*—In a criminal case, a charge which predicates reasonable doubt of the defendant's guilt alone upon the defendant's good character, is erroneous and properly refused.
8. *Same; same.*—In a criminal case, a charge is erroneous and properly refused which instructs the jury that "Before the jury can convict the defendant they must be satisfied to a moral certainty not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence of the defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance as to his own interest, then they must find the defendant not guilty."
9. *Charge to the jury; properly refused when mere repetition.*—In the trial of a criminal case, it is not error to refuse to give charges which are substantially repetitions of instructions already given by the court.

[Watkins v. The State.]

APPEAL from the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The appellant in this case, Carter Watkins, was jointly indicted with Henry Thomas, for the murder of Willie Brown, was convicted of manslaughter in the first degree and sentenced to the penitentiary for five years.

Upon the arraignment of the defendant the court ordered that 100 jurors, including the regular panel, be summoned to appear from which the jury was to be drawn for the trial of the defendant. The defendant moved the court to quash the venire upon the ground that Sylvester J. Russell, whose name appears upon the list of jurors served upon the defendant, was not living at the time the said jury was drawn, and that, therefore, the order of the court requiring 100 jurors to be drawn for the trial of his cause had not been complied with. Upon the hearing of this motion, it was shown that the venire drawn to try said cause contained 100 names, one of which was the name of Sylvester J. Russell; that said Russell died after his name was put in the jury box by the jury commissioners, and that his death occurred between the time of placing his name in the jury box and the drawing of his name as a juror to serve in this case. The motion to quash was overruled, and thereupon the defendant duly excepted.

The evidence for the State tended to show that the killing of Willie Brown by the defendant, Carter Watkins, was not in self-defense, but that Brown was killed by Watkins without provocation.

The evidence for the defendant tended to show that the killing was in self-defense. There was also evidence introduced by the defendant tending to show that he was a man of good character.

The defendant sought to lay a predicate for the introduction of secondary evidence of what Gray Kemp testified to on the preliminary trial of the defendant. For the purpose of laying a predicate one John Simmons was introduced as a witness, who testified that he thought he knew where Kemp was; that the last time he saw him was at Citronville, in Mobile county, when he was leaving, and that Kemp told him he was going

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to work at a certain designated place in Mississippi, and was going to stay until the case was over. On cross-examination this witness testified that he did not know whether said Kemp was a married man, or whether he intended to live in Mississippi all the time, but that he stated that he was going to stay in Mississippi until after this case was finished; that he could not swear of his own knowledge that he was in Mississippi, but that he thought so, and some person told him a few days before that that Kemp was in Mississippi. Upon this testimony the court refused to allow the witness, before whom the preliminary trial was had, to testify to what witness Kemp swore on the preliminary trial. And to this ruling the defendant duly excepted.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "The court charges the jury that if the defendant was reasonably without fault in bringing on the difficulty and at the time of the homicide there appeared so apparently as to lead a reasonable mind to the belief that it actually existed, a present, imperious and impending necessity in order to save himself from great bodily harm, to kill the deceased, then he had the right to shoot the deceased, and the jury must acquit him on the ground of self-defense." (2.) "If the jury believe from the evidence that defendant did not bring on, provoke or encourage the difficulty, and that the deceased had previously made threats which had been communicated to the defendant at the time of the difficulty, and the deceased advanced upon the defendant in a threatening manner and started for defendant and at the time there was to all appearances no reasonable mode of escape without increasing defendant's peril, then defendant was authorized to anticipate the deceased and shoot first, having the right to act upon the reasonable appearance of things." (3.) "The court charges the jury that the appearance of the danger to loss of life or great bodily harm, which will justify one in taking human life, need not be actual or real, if they are such as to create in the mind of the slayer the reasonable belief that it is necessary to strike or shoot his assailant

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in order to save himself from great bodily harm or loss of his own life; and acting upon this reasonable belief, if he strikes or shoots and death ensues, this would not be manslaughter, but would be justifiable or excusable homicide; and if you believe from all the evidence in the case now before you that defendant shot and killed the deceased upon the well grounded belief that it was necessary to do so in order to save himself from great bodily harm, or from death, then it is your duty to acquit the defendant." (4.) "A homicide committed under such circumstances surrounding the person charged therewith at the time of the fatal act as to create in his mind a reasonable belief, well founded and honestly entertained of his own present and immediate imminent peril, and of the urgent necessity to take the life of his assailant, as the only alternative of saving his own or of preventing the infliction upon his person of great bodily harm, it is homicide committed in self-defense." (5.) "The court charges the jury that good character may, when taken in connection with all the other evidence in the case, be sufficient to raise a reasonable doubt of defendant's guilt." (6.) "The court charges the jury that good character is a good thing to have, and when the defendant proves that he had a good character, the jury should look at this fact in connection with all the other evidence in the case, and if upon the whole evidence they do not have an abiding conviction that the defendant is guilty, they should acquit him." (7.) "If the prisoner has proved a good character as a man of peace, the law says that such good character may be sufficient to generate a reasonable doubt of his guilt, although no such doubt exists but for such good character." (8.) "Before the jury can convict the defendant they must be satisfied to a moral certainty not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence of the defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty."

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(9.) "If you believe from the evidence that Henry Thomas and Carter Watkins were at the dwelling house of Jack Russell by invitation of the owner or occupant of such house, and that Tom Warren and Willie Brown were trespassers at said house at the time of the killing, then what the court has said to you in reference to the duty of the defendant to retreat has no application in this case, and the court now charges you that if you believe from the evidence that at the time the fatal shot was fired that Tom Warren and Willie Brown were making an assault upon any of the occupants of said house, then the defendant had a right to strike and kill if necessary to protect themselves, or either one of them, or any member of the household from the assault." (10.) "Good character may generate a reasonable doubt in cases where without such proof the jury would be satisfied beyond a doubt of the guilt of the defendant." (11.) "If the jury believe the evidence in this case, Carter Watkins was the guest of Jack Russell at the time of the fatal difficulty." (12.) The court charges the jury that if they believe the evidence in this case, they must find that the defendant, Carter Watkins, was free from fault in bringing on the difficulty." (13.) "The court charges the jury that if they believe the evidence in this case Carter Watkins was at the time of the shooting the guest of Jack Russell, and if free from fault in bringing on the fatal difficulty, and was feloniously assaulted or threatened with a felonious assault, he could stand his ground and repel such assault with such force as to a reasonable mind appeared necessary even to the taking of life."

After considering the case, the jury returned the following verdict: "We, the jury, find the defendant, Carter Watkins, guilty of manslaughter and fix the punishment at five years in the penitentiary; and we, the jury, find the defendant, Henry Thomas, not guilty."

Upon this verdict the court rendered a judgment of conviction of manslaughter and sentenced the defendant Watkins to imprisonment in the penitentiary for five years.

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BROMBERG & HALL, for appellant.—The verdict in this case was not sufficient to sustain a judgment of conviction or the sentence of the court. "No judgment of conviction under an indictment for murder can be sustained unless the verdict of the jury expressly finds the degree of the crime of which the defendant is convicted." *Story v. State*, 71 Ala. 335; *Levison v. State*, 54 Ala. 524; *Robert v. State*, 42 Ala. 510; *Cobia v. State*, 16 Ala. 783; *St. Clair v. Caldwell*, 72 Ala. 528.

The defendant's motion to quash the venire should have been sustained on account of the name of a dead man being included in such venire.—*Roberts v. State*, 68 Ala. 515.

The charges requested by the defendant should have been given.—*Washington v. State*, 125 Ala. 40; *Burton v. State*, 107 Ala. 68; *Pickens v. State*, 115 Ala. 47.

CHAS. G. BROWN, Attorney-General, for the State.

The State insists that the verdict in the case taken and construed as a whole does affirmatively show that defendant was convicted of manslaughter in the first degree.—*Davis v. State*, 52 Ala. 358.

The record shows that the juror died after his selection and his name placed in the jury box. There was no evidence that when drawn it was known that he was dead, and so there was not the slightest evidence as to fraud in the drawing. There is no merit in this exception. *Gibson v. State*, 89 Ala. 121.

The court properly refused the charges requested by the defendant.—*Thompson v. State*, 106 Ala. 67; *Den nis v. State*, 118 Ala. 72; *McMunn v. State*, 113 Ala. 86; *Rogers v. State*, 117 Ala. 9; *Amos v. State*, 123 Ala. 50; *Gibson v. State*, 91 Ala. 64; *Toliver v. State*, 94 Ala. 111; *Adams v. State*, 115 Ala. 9.

HARALSON, J.—The Code, section 4875, provides, that "When the jury finds the defendant guilty under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or second degree," etc. This is for the reason, that the statute, for the purpose of adjusting the punishment, makes mur-

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ders at common law of a certain class, murders in the first degree, and all others murders in the second degree, affixing the penalty of those in the first degree, at death or imprisonment for life in the penitentiary, at the discretion of the jury, and for those falling within the second degree, at not less than ten years, at the discretion of the jury. So, it has been properly held, that a general verdict of guilty under an indictment for murder, which does not ascertain its degree, will not sustain a judgment of conviction.—*Story v. State*, 71 Ala. 329. But, the statute makes no such requirement, as to manslaughter. It divides that offense into manslaughter in the first and second degree, punishing the first by imprisonment in the penitentiary for not less than one nor more than ten years, and the second, at imprisonment in the county jail, or to hard labor for the county for not more than one year, and may also be fined not more than \$500; the imprisonment in each instance to be fixed by the jury.—Code, §§ 4860, 4862. The jury found the defendant “guilty of manslaughter” and fixed “the punishment at five years in the penitentiary.” This verdict was sufficient to show that the jury found the defendant guilty of manslaughter in the first degree. It has no application to manslaughter in the second degree.—*Davis v. State*, 52 Ala. 357; *Anderson v. State*, 65 Ala. 553; *Wright v. State*, 79 Ala. 262; *Sampson v. State*, 107 Ala. 76.

2. There was no merit in the motion to quash the *venire*, because one of the persons whose name appears thereon was dead at the time the *venire* was drawn. There was no evidence that this fact was known to the court at the time of the drawing, or of any fraud by which the name was put on the list.—*Gibson v. State*, 89 Ala. 121; *Walker v. State*, 91 Ala. 76; Mobile Jury Law, Acts 1894-95, p. 481, § 2.

3. Under the evidence, we cannot hold that the court below was in error, in holding that the evidence adduced was not sufficient to allow secondary evidence of the absent witness, Kemp, on the ground that no proper predicate had been laid to show that the witness was permanently absent from the State, or for an indefinite period.—*Thompson v. State*, 106 Ala. 67; *McMunn v.*

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State, 113 Ala. 86; *Dennis v. State*, 118 Ala. 72.

4. The first charge does not hypothesize freedom from fault in bringing on difficulty. The expression "reasonably without fault," in doing so, is not sufficient.

The second is erroneous in not submitting to, but withholding from, the jury the right to determine whether the facts hypothesized were sufficient to show imminent peril to life or limb.—*Gilmore v. State*, 126 Ala. 22.

The third and fourth ignore freedom from fault in bringing on difficulty.

The fifth is duplicated in given charges 18 and 20. The sixth is argumentative, and lays stress upon a single fact, as do the seventh and tenth, which also predicate reasonable doubt upon good character alone.

The eighth has more than once been condemned by us.—*Rogers v. State*, 117 Ala. 9; *Amos v. State*, 123 Ala. 54.

The ninth is duplicated in given charges 14, 15 and 17, and the 11th, 12th and 13th were correctly refused as invasive of the province of the jury.

No error appearing, the judgment below is affirmed.

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Indictment for Murder.

1. *Evidence; motive for particular acts of defendant admissible on his cross-examination.*—While it is not competent for the defendant, who is examined in his own behalf, to testify on direct examination as to his motives in the doing of certain acts, it is permissible, upon the cross-examination of the defendant, to inquire as to his motives for particular acts testified to by him, which were relevant to the issues involved in the case.

APPEAL from the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The appellant, Lee Hurst, was jointly indicted with

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Walter Jordan for the murder of Robert McWhorter. A severance was had, and Lee Hurst was convicted of murder in the first degree and sentenced to the penitentiary for life.

After proving the *corpus delicti* and the venue of the offense, the evidence for the State tended to show that the defendant, Lee Hurst, became involved in a difficulty with one White on a street in the city of Mobile; that White's brother came to his assistance and the defendant then sent word to Walter Jordan to come and help him; that Jordan rushed out drawing his pistol as he came; that defendant then said "Wait until I come back and we will fix him," and then ran down the street to the house of one Jack Mason, who was his cousin; that Jordan waited for the defendant, and that as Hurst came running back Jordan turned and began firing back at the crowd where White and his brother were standing; that Hurst attended him and fired in the same direction; that McWhorter, a bystander, was shot through the head and killed; that it was uncertain as to whether Hurst or Jordan fired the fatal shot, but that McWhorter fell at the second shot that Jordan fired, and died instantly.

The evidence for the defendant tended to show that when he had the difficulty with White and his brother he did not send for Jordan; that when Jordan came upon the scene the defendant had already gone down the street and had no conversation whatever with Jordan; that the defendant Hurst did not at any time have a pistol and did not fire during the difficulty in which McWhorter was killed; that Jordan fired the fatal shot, and the defendant uttered no words of encouragement or words to incite Jordan to shoot; that the defendant Hurst did run to the house of Jack Mason and come back to the scene of the shooting and was near Jordan while the shooting was going on.

Upon the cross-examination of the defendant as a witness he was asked by the solicitor the following question: "What did you run around to Jack's house for? What was your object in running around there?" The defendant objected to the questions on the ground that

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it called for the uncommunicated motive or intention of the witness. The court overruled the objection, and the defendant duly excepted. Upon the defendant answering that he went to the house of Jack Mason to get a pistol, he was then asked by the solicitor: "What did you want with a pistol?" The defendant objected to this question on the ground that it called for the uncommunicated motive or intention of the witness. The court overruled the objection, and the defendant duly excepted. The defendant answered that he went to prepare himself to fight White and his brother. This ruling on the evidence constitutes the only question reviewed on the present appeal.

PALMER PILLANS, for appellant.—Proof of intention must be confined to proof of statements thereof made so as to be part of the *res gestae*, and proof of facts from which the jury may infer the intent.—*Ellis v. State*, 105 Ala. 72; *Stewart v. State*, 78 Ala. 439; *Burk v. State*, 71 Ala. 382; *Whizenant v. State*, 71 Ala. 384; *Dent v. State*, 105 Ala. 17; *State v. Tally*, 102 Ala. 35; *Johnson v. State*, 102 Ala. 16; *Lewis v. State*, 96 Ala. 6; *Fonville v. State*, 91 Ala. 39.

CHAS. G. BROWN, Attorney-General, for the State, cited *Linnchan v. State*, 120 Ala. 298; *Yarbrough v. State*, 115 Ala. 97.

TYSON, J.—The questions propounded to defendant on cross-examination, notwithstanding they called for his secret, unexpressed motives or purposes, were not illegal and his responses to them were competent and relevant. Whilst it is true, as a general rule, secret intentions or unexpressed motives of a witness cannot be called for, the rule applies more particularly where a party seeks, in his own behalf, to prove by his own or his witness' testimony, the secret, unexpressed motives or purposes of the person testifying. On cross-examination, where great latitude is allowed, the questions asked in this case were properly allowed. This principle was pointedly declared in *Linnchan v. State*, 120 Ala. 293,

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Yarbrough v. State, 115 Ala. 92. See also *Thomason v. Dill*, 30 Ala. 444.

The case of *Ellis v. State*, 105 Ala. 72, relied upon by appellant, is not in conflict with these views. The point here under consideration was not involved, nor decided. While it was attempted to be raised in that case, the objection to the question was held to be insufficient for that purpose.

Affirmed.

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Indictment for Robbery.

1. *Robbery; sufficiency of indictment.*—An indictment for robbery which describes the property alleged to have been feloniously taken as “thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents,” is sufficiently particular in the description of said property, and is not subject to demurrer for vagueness and indefiniteness of description.
2. *Same; same.*—An indictment for robbery which describes the property alleged to have been feloniously taken as “a bunch of keys of the value of one dollar,” and “a knife of the value of seventy-five cents,” is sufficiently particular in the description of said property, and is not subject to demurrer upon the ground of vagueness and indefiniteness of description.
3. *Same; when election on the part of the State not required.* Where an indictment for robbery contains three counts, one of which charges the property feloniously taken to be “thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents,” and the second count charges the property alleged to have been taken as “a bunch of keys of the value of one dollar,” and the third count charges that the defendant feloniously took “a knife of the value of seventy-five cents,” there is not presented a case for compelling the State to elect as between the several counts of the indictment as to which one he will ask for a conviction.

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4. *Robbery; admissibility of evidence.*—Where two persons are jointly indicted for robbery and a severance is had, and upon the trial of one of them the evidence for the State shows that the offense charged was committed by the defendant's co-defendant pointing a pistol at the person alleged to have been robbed, it is competent for the State to prove that the defendant's co-defendant was seen with a pistol an hour or two before the commission of the alleged robbery; such evidence tending to corroborate the testimony for the State.
5. *Charge of court as to reasonable doubt.*—In the trial of a criminal case, a charge is properly refused as being argumentative, which instructs the jury that "before you can convict the defendant you must be satisfied to a moral certainty not only that the proof is consistent with the guilt of the defendant, but it is wholly inconsistent with every other rational conclusion, and unless you are so convinced by the evidence of the defendant's guilt, that you would each venture to act upon that decision in matters of the highest concern and importance to your own interest, you must find the defendant not guilty."
6. *Same; propriety of explanatory charge.*—Where a court upon the request of the defendant instructs the jury that "I charge you that the only foundation for a verdict of guilty is that the entire jury shall believe from the evidence beyond a reasonable doubt and to a moral certainty, that the defendant is guilty as charged in the indictment, to the exclusion of every possibility of his innocence and every reasonable doubt of his guilt; and if the State has failed to furnish such measure of proof and to so impress the minds of the jury of his guilt, they should find him not guilty," it is not error for the court by way of explanation to further instruct them orally that "that means, gentlemen, that every member of the jury must believe the defendant is guilty beyond a reasonable doubt before a conviction should be had."
7. *Same; same.*—Where the court, at the request of the defendant, instructs the jury that "I charge you to acquit, unless the evidence excludes every reasonable supposition but that of defendant's guilt," it is not error for the court by way of explanation, to further instruct the jury that "that means you must believe defendant's guilt beyond a reasonable doubt, or acquit."
8. *Same; charge as to reasonable doubt.*—On the trial of a criminal case, a charge given by the court at the request of the

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State, instructing the jury that "if any one of the jury has a reasonable doubt of the guilt of the defendant, they are not for this reason required to acquit the defendant," is free from error.

APPEAL from the Circuit Court of Morgan.

Tried before the Hon. O. KYLE.

The appellant, Tom Nevill, was jointly indicted with Austin Griffin for robbery, was convicted and sentenced to the penitentiary for ten years. The indictment contained three counts. The first count of the indictment was as follows: "1. The grand jury of said county charge that before the finding of this indictment, that Austin Griffin and Tom Nevill feloniously took thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents, the personal property of A. J. Widner, from his person and against his will and by violence to his person, or by putting him in such fear as unwillingly to part with the same, against the peace and dignity of the State of Alabama."

The second count was the same as the first, except that in said count the property alleged to have been feloniously taken was described as "a bunch of keys of the value of one dollar."

The third count was the same as the first, except that the property alleged to have been feloniously taken was described as "a knife of the value of seventy-five cents." The appellant in the present case, Tom Nevill, demanded a severance, which was granted, and he was tried alone.

The defendant demurred to the first count of the complaint upon the following grounds: 1. It fails to aver that the twenty-five cents piece or the five cents piece was of copper, silver, gold or other named metal. 2. That the description of the money was vague and indefinite, and that there is no averment as to the specie of coin. 3. That the kind of coin to which the twenty-five cents piece and the five cents piece belong is not alleged, nor is it alleged that it was unknown to the grand jury.

To the second count of the indictment defendant demurred upon the ground that it fails to aver the kind or character of keys constituting said bunch of keys.

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To the third count of the indictment the defendant demurred upon the ground that it fails to show the kind or character of knife, or that the same was unknown to the grand jury. Each of these demurrers were overruled.

After the jury was organized the defendant moved the court to require the State to elect upon which count of the indictment it would seek a conviction. This motion was overruled, and to this ruling the defendant duly excepted.

A. J. Widner was introduced as a witness and testified substantially that on Sunday night, January 20, 1901, as he was going near the depot of the Southern Railway in Decatur, the defendant, Tom Nevill, met him and ordered him to halt; that Austin Griffin walked up behind him and shoved a pistol in his face; that while in this attitude Griffin put his hand in his pocket and took therefrom a twenty-five cents piece and a five cents piece of money, a bunch of keys worth a dollar and a knife worth seventy-five cents. The defendant thereupon moved the court to require the State to elect as to which article taken from the witness it would seek a conviction. The court refused this motion, and to this action of the court the defendant duly excepted. The witness further testified that it was dark and between 11 and 12 o'clock, but that he recognized the defendant Nevill and Austin Griffin; that he gave up the money and articles through fear and intimidation caused by the action of the defendant and Austin Griffin.

The defendant introduced testimony tending to show an *alibi*; that at the time fixed by the witness Widner as the time of the commission of the offense charged, he, the defendant, Tom Nevill and Austin Griffin were in another part of Decatur and were not present at the place designated.

The defendant, as a witness in his own behalf, testified that he did not see said Widner on the night testified to by him, and that he did not take or assist in taking from him any money, keys, knife or other property. One of the witnesses for the State was introduced in rebuttal and testified that between 10 and 11 o'clock she

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saw the defendant Austin Griffin near the railroad station of the Southern Railway in Decatur. This witness was asked the following question: "Whether or not Austin Griffin had a pistol between 10 and 11 o'clock?" The defendant objected to the question because it called for irrelevant, immaterial and illegal evidence, and because it had reference to a time different from that identified as the alleged hour at which the robbery was committed. The court overruled the objection, and the defendant duly excepted. The witness answered that Austin Griffin had a pistol at the time designated in the question and showed it to the defendant Tom Nevill.

The court, at the request of the State, gave to the jury the following written charge, to the giving of which the defendant duly excepted: "If any one of the jury has a reasonable doubt of the guilt of the defendant, they are not for this reason required to acquit the defendant."

The defendant requested the court to give to the jury the following written charge, and separately excepted to the court's refusal to give said charge as asked: "Before you can convict the defendant you must be satisfied to a moral certainty not only that the proof is consistent with the guilt of the defendant, but it is wholly inconsistent with every other rational conclusion and unless you are so convinced by the evidence of the defendant's guilt, that you would each venture to act upon that decision in matters of the highest concern and importance to your own interest, you must find the defendant not guilty."

The bill of exceptions contains the following recital as to the court's giving a charge requested by the defendant: "Upon the request of the defendant the court gave the following written charge: 'I charge you that the only foundation for a verdict of guilty is that the entire jury shall believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged in the indictment, to the exclusion of every possibility of his innocence and every reasonable doubt of his guilt; and if the State has failed to furnish such measure of proof and to so impress the minds of the jury of his guilt, they should find him not

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guilty,' and then added, voluntarily, the following oral charge: 'That means, gentlemen, that every member of the jury must believe the defendant is guilty beyond a reasonable doubt before a conviction should be had.' " The defendant excepted to the giving of the oral part of charge as added by the court.

The bill of exceptions also contained the following recital as to a charge given by the court at the request of the defendant: "Upon defendant's request the court gave the following written charge: (A.) 'I charge you to acquit, unless the evidence excludes every reasonable supposition but that of defendant's guilt,' and then, voluntarily, added the following oral charge: 'That means you must believe defendant's guilt beyond a reasonable doubt or acquit.' "

The defendant duly excepted to the giving of this part of the charge as added by the court.

MARVIN WEST and S. A. LYNNE, for appellant.—The indictment was subject to the demurrers interposed thereto.—*Wesley v. State*, 61 Ala. 286; *Crocker v. State*, 47 Ala. 53.

The court erred in admitting testimony that Griffin had a pistol when seen with the defendant an hour or two before the offense was committed.—*Murphy v. State*, 6 Ala. 845; *Brown v. State*, 120 Ala. 342; *Sears v. State*, 33 Ala. 347; *Costello v. Crowell*, 130 Mass. 588; *Martin v. State*, 104 Ala. 71; *Greenfield v. People*, 39 Am. Rep. 636; 1 Greenleaf on Evidence, § 222; *R. Co. v. Wodruff*, 59 Am. Rep. 155.

CHAS. G. BROWN, Attorney-General, for the State.

SHARPE, J.—Sufficient particularity of description was observed in the indictment in respect of the property averred to have been taken. As to the money see *Browning v. State*, 87 Ala. 80. As to the other property see *Churchwell v. State*, 117 Ala. 124.

No case for compelling the State to an election as between the several counts of the indictment.—*Carlton v. State*, 100 Ala. 130; *Butler v. State*, 91 Ala. 87.

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As a circumstance tending to corroborate the State's witness Widner, wherein he testified that Griffin used a pistol while helping defendant to rob him, evidence that Griffin had a pistol when seen with defendant an hour or two before that occurrence was admissible.

Charges like the one here refused to defendant were condemned as argumentative in *Rogers v. State*, 117 Ala. 9, and *Amos v. State*, 123 Ala. 50. Because this charge was faulty in that respect there was no error in its refusal. In *Amos' case, supra*, opinions favoring such charges were expressly repudiated.

The explanation by the court of the first charge given for defendant apparently had reference to the required unanimity of the jury in finding a verdict. Reversible error is not found in that explanation or in the court's explanation of the second given charge.

While a lack of unanimity would have made a conviction improper, it did not necessarily require an acquittal. A mistrial might have been proper. The charge given for the State asserts no more in effect.

Affirmed.

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Indictment for Murder.

1. *Charge of court to jury; reasonable doubt and probability of innocence.*—In the trial of a criminal case, a charge requested by the defendant which instructs the jury that "a reasonable doubt of defendant's guilt is not the same as a probability of his innocence. A reasonable doubt of defendant's guilt may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence," asserts a correct legal proposition, is not ambiguous, argumentative or misleading, and its refusal is a reversible error.
2. *Same; self-defense.*—On the trial under an indictment for murder, charges to the jury requested by the defendant which postulate the defendant's acquittal upon the plea of self-defense, without setting out the constituent elements of self-defense, are faulty and properly refused.

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3. *Same; same; burden of proof.*—Under a plea of self-defense, the burden of proof is upon the defendant, and charges which place the burden as to this issue upon the State are erroneous and properly refused.
4. *Same; homicide.*—On a trial under an indictment for murder, a charge which instructs the jury that "If there is generated in their minds by the evidence in this case, or any part of it, after consideration of the whole evidence by them, a well founded doubt of defendant's guilt of any offense, then the jury must find the defendant not guilty," is erroneous and properly refused.

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

The appellant, John Stewart, was indicted and tried for the murder of Bud Garrett, was convicted of murder in the first degree and sentenced to life imprisonment in the penitentiary.

The evidence for the State tended to show that the defendant shot the deceased with a pistol without provocation, and that from the effects of the wounds inflicted deceased died. There was testimony introduced for the defendant tending to show that the fatal shot was fired in self-defense.

The only questions presented for review on the present appeal are those arising from the court's refusal to give the following written charges requested by the defendant, to the refusal to give each of which the defendant separately excepted: (5.) "If the jury have a reasonable doubt growing up out of the evidence in this case as to whether or not the defendant acted in self-defense, they must acquit him." (7.) "The court charges the jury that it is a well settled rule of law that if there be two reasonable constructions which can be given to the facts proven in this case, one favorable and the other unfavorable to the defendant, it is the duty of the jury to give that which is favorable rather than that which is unfavorable to the accused." (12.) "The court charges the jury that if there is generated in their minds by the evidence in this case or any part of it, after consideration of the whole evidence by them, a well founded doubt of defendant's guilt of any offense,

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then the jury must find the defendant not guilty." (13.) "If, after considering all the evidence, that tending to show self-defense included, the jury have a reasonable doubt whether the defendant is guilty or whether he acted in self-defense, the law says the jury must find the defendant not guilty." (14.) "If, after considering all the evidence in the case, that tending to show self-defense included, there is a probability of defendant's innocence, the law says the jury must give the defendant the benefit of such probability and find him not guilty." (15.) "The court charges the jury that a reasonable doubt of defendant's guilt is not the same as a probability of his innocence. A reasonable doubt of defendant's guilt may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence." (20.) "The law does not presume that the killing of the deceased was malicious because a deadly weapon was used by the defendant." (26.) "To authorize a conviction in any case every element which is a necessary constituent of the offense charged must be established beyond a reasonable doubt; and when self-defense is relied on as a defense there is no greater burden upon the defendant to establish self-defense affirmatively by a preponderance of the evidence than any other defense, and if all the evidence in this case raises in the minds of the jury a reasonable doubt as to whether the defendant acted in self-defense or not, the defendant should be found not guilty." (33.) "If the confession of the defendant is not harmonious and consistent with the other evidence it is the province of the jury to reject it as wanting in credibility or as not entitled to weight in determining the question of the guilt or innocence of the defendant." (35.) "The character of the deceased for violence, if the jury find from the evidence that such was the character of the deceased, and the threats made by the deceased towards the defendant, if the jury find from the evidence that such threats were made, should be weighed by the jury in determining whether the defendant when he fired the fatal shot acted under a reasonable apprehension of present impending peril to his life or of suffering some other grievous bodily harm." (36.) "The court charges

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the jury that if they find from the evidence that the deceased was a violent and dangerous man, that such was his character and disposition, then the defendant would be justified in resorting to more prompt and decisive measures of defense than if the deceased was a man of peaceable disposition." (39.) "The court charges the jury that an act performed by a quick, impulsive and bloodthirsty man may afford much stronger evidence that the life of the assailed was in imminent peril, than if performed by one known to possess an entirely different character and disposition, and might very reasonably justify a resort to more prompt measures of self-preservation; and the jury may look to the evidence in determining if the deceased was a man of such character, and whether the defendant had a right to shoot to protect himself from great bodily harm." (40.) "The court charges the jury that they may look to all the facts and circumstances connected with the shooting of the deceased by the accused, in determining his guilt or innocence, and if the jury believe from the evidence that the facts and circumstances were such at the time of the shooting as to generate in the minds of the defendant a reasonable apprehension of real or apparent danger of life or great bodily harm, then the defendant was justified in shooting, provided he was free from fault in bringing on the difficulty."

BOYKIN & LEE, for appellant, cited *Miller v. State*, 107 Ala. 40; *Prince v. State*, 100 Ala. 144; *Hurd v. State*, 94 Ala. 100; *Walker v. State*, 117 Ala. 42; *Elmore v. State*, 92 Ala. 51; *Turner v. State*, 124 Ala. 59; *Forney v. State*, 98 Ala. 19; *Henson v. State*, 112 Ala. 41; *Whitten v. State*, 115 Ala. 72.

CHAS. G. BROWN, Attorney-General, for the State.

DOWDELL, J.—The only questions reserved in the record for our consideration grow out of the refusal of the trial court to give certain written charges requested by the defendant. Charge 15 was a correct statement of the law, and should have been given.—*Croft v. State*, 95 Ala. 3.

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Written charges which ask for an acquittal postulated on the plea of self-defense without setting out the constituent elements of self-defense, should not be given.—*Gilmore v. State*, 126 Ala. 20; *Rogers v. State*, 117 Ala. 15; *Miller v. State*, 107 Ala. 40; *McElroy v. State*, 120 Ala. 274.

Under the plea of self-defense the burden of proof is on the defendant, and charges which place the *onus* of proof as to this issue on the State, are improper and should be refused.

Of the remaining charges refused to the defendant, numbered 5, 7, 12, 13, 14, 26, 33, 35, 36, 39, 40, it is sufficient to say that those not subject to the infirmities above stated, were otherwise objectionable as being argumentative, or when applied to the evidence in the case misleading.

Charge No. 12 requested by the defendant is not the same as charge 3, which was pronounced good by this court in *Turner v. State*, 124 Ala. 59. The difference is, that the charge there asked an acquittal upon a well founded doubt of the defendant's guilt growing out of the evidence in the case, while the charge here asks for an acquittal upon a well founded doubt of the defendant's guilt of *any offense*, etc. The superadded words, of any offense, rendered the charge misleading. The jury might have a well founded doubt of the defendant's guilt of some offense other than that charged in the indictment, and if they should, the charge requested, directs an acquittal.

For the refusal of the court to give charge No. 15 the judgment must be reversed and the cause remanded.

Christian v. The State.

Indictment for Assault with Intent to Murder.

1. *Confession; when shown to be voluntary.*—On a trial under an indictment for an assault with intent to murder, it was shown that the defendant was arrested by three or four armed

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men in a house where there were several other people. One of the posse said to the defendant, calling him by name, "We have come after you." The defendant asked "What for?" The officer stated that he knew what for. That thereupon the defendant replied: "Yes, for shooting George Willis [the man alleged in the indictment to have been assaulted]. I did it," and further stated where he was standing at the time he shot said Willis. *Held*: That there was shown to be no promise or threats made to induce or coerce the defendant to make such confession; and that, therefore, there was no error in admitting such testimony.

2. *Assault with intent to murder; charge of court to jury.*—On a trial under an indictment for an assault with intent to murder, where it is shown that the assault was committed with a shot gun, and that at the time of firing the shot gun the defendant was standing twenty or twenty-five feet from the person assaulted, a charge is erroneous and properly refused which instructs the jury that "unless the jury are satisfied from the evidence beyond a reasonable doubt that the gun testified as the gun used by the defendant loaded with number six shot, fired at the distance of twenty steps, as testified in this case, was capable of producing the death of George Willis at the time the gun was fired, they can not find the defendant guilty of an assault with intent to murder."

APPEAL from the Circuit Court of Chilton.

Tried before the Hon. N. D. DENSON.

The appellant in this case, Joe Christian, was indicted, tried and convicted for an assault with intent to murder one George Willis, and was sentenced to the penitentiary for twenty years. The evidence relating to the confession made by the defendant is shown in the opinion.

The evidence for the State tended to show that the said Willis was shot while he was sitting in his door, and it was further shown that the gate where the defendant said he was standing when he shot George Willis was twenty or twenty-five steps from where George Willis was sitting at the time he was shot.

The charge requested by the defendant, to the refusal to give which the defendant separately excepted, is copied in the opinion.

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W. A. COLLIER, for appellant.—The court erred in refusing to give the charge requested by the defendant. *Mullins v. State*, 45 Ala. 43.

CHAS. G. BROWN, Attorney-General, for the State.

MCCLELLAN, C. J.—It affirmatively appeared that no promises or threats were made to the defendant to induce or coerce him to a confession. All that occurred bearing upon the character and fact of the confession received in evidence was this: Three or four armed men in quest of the defendant to arrest him came upon him in a house where there were several other people. One of the posse said to defendant: "Joe, we have come after you." Defendant answered: "What for?" The officer said: "You know what for." The defendant replied: "Yes; for shooting George Willis. * * * I did it," and he said further that he "was standing at George Willis' gate when he shot him." And these statements of the defendant constitute the confessions which were admitted against defendant's objection. Clearly there was no error in receiving this testimony.—1 Mayfield's Dig., 209-11.

The only other ruling presented for review is the refusal of the court to give the following charge: "The court charges the jury that unless the jury are satisfied from the evidence beyond a reasonable doubt that the gun testified as the gun used by the defendant loaded with number six shot, fired at the distance of twenty steps, as testified in this case, was capable of producing the death of George Willis at the time the gun was fired, they cannot find the defendant guilty of assault with intent to murder." Leaving out of view some minor infirmities, each sufficient in itself to condemn this charge, it will suffice to say that assuming the assault with a gun within its carrying distance it cannot be the law that guilt or innocence of the aggravated assault charged in this indictment turns upon the inquiry whether the weapon employed was potent to the effectuation of the murderous design of the defendant. To say the most, an apparent adaptation of the means to

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the end is all that the jury need find in such case, and to say the least there is an apparent deadly potency in any ordinary gun, charged with number six shot, at twenty steps.—*Mullens v. State*, 45 Ala. 43.

Let the judgment be affirmed.

Scott v. The State.

Indictment for Murder.

1. *Organization of jury; when juror properly excused.*—When in his examination touching the qualification of one who has been summoned as a juror for the trial of a murder case, it is shown that he was on the grand jury when the indictment for an assault with intent to murder the deceased was found against the defendant for the same act with which he is now charged with murder, and that said juror was on the defendant's bail bond for his appearance in the present case, it is not error for the court, of its own motion, to excuse such juror from sitting on the jury and ordering him to stand aside.
 2. *Trial and its incidents; when not error for court to adjourn from court room to another room in the court house for the purpose of examining witness.*—It is not error, nor a ground of objection from any point of view, that during the trial of a criminal case the court, with the jury, the defendant, officers of the court and attorneys repaired from the court room, where the trial was being conducted, to the sheriff's office, which was in another part of the court house, for the purpose of examining a witness for the State, who was suffering from rheumatism, and who could not be brought into the court room without considerable pain to him.
 3. *Homicide; charge as to freedom from fault in bringing on difficulty.*—In a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if they believe from all the evidence that the defendant was reasonably free from fault in bringing on the difficulty, it can not be said that he was responsible for bringing on the difficulty."
 4. *Same; same.*—In such a case, a charge is erroneous and properly refused which instructs the jury that "under the evi-
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dence in this case the accused can not be deprived of the right of self-defense under the charge of murder in the indictment, even though the proof shows that the accused was in fault in bringing on the difficulty, unless it be further shown that he intended to bring it on, and to bring it on with felonious intent."

5. *Same; charge as to good character.*—The good character of a defendant in a criminal case is never of itself sufficient to generate a reasonable doubt of the defendant's guilt; and, therefore, a charge is erroneous and properly refused which instructs the jury that "If they find from the evidence that the defendant is a man of good character, they may consider that character in connection with the other evidence in the case in determining his guilt, and it may generate a reasonable doubt of his guilt."
6. *Same; charge as to fault in bringing on difficulty.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "If the defendant acted in self-defense in the difficulty at the beginning, and even though he might have renewed it after the deceased retreated, yet if they believe that the defendant did not realize that the deceased had abandoned the difficulty, then they must acquit the defendant."

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. S. H. SPROTT.

The appellant, Will Scott, was indicted for the murder of Robert H. Seymour by shooting him with a pistol, was convicted of manslaughter in the first degree and sentenced to five years in the penitentiary.

The bill of exceptions contains the following recital in reference to the organization of the jury: "During the organization of the jury Steve Smith was called as a juror. The court having duly examined him as a juror touching his qualifications as such decided and so announced that he was a competent juror. The solicitor by leave of the court, before passing on said juror, asked said Smith if he was on defendant's bond for his appearance in this cause, and said Smith answered that he was, and the solicitor asked said Smith if he was on the grand jury when an indictment for attempt to murder was found against the defendant for the same act with which the defendant is now charged with murder; to which question the said Smith answered that he was.

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Thereupon the court, of its own motion, against the objection of the defendant, excused the said Smith as a juror, and directed him to stand aside. To the action of the court in excusing said Smith and directing him to stand aside the defendant then and there duly excepted.

The State introduced evidence tending to show that the defendant was guilty as charged in the indictment. The evidence for the defendant tended to show that the fatal shot was fired in self-defense. There was evidence introduced on the part of the defendant tending to show that he was a man of good character.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (A.) "The court charges the jury that if they believe from all the evidence that the defendant was reasonably free from fault in bringing on the difficulty, it can not be said that he was responsible for bringing on the difficulty." (8.) "I charge the jury that under the evidence in this case the accused can not be deprived of the right of self-defense under the charge of murder in the indictment, even though the proof shows that the accused was in fault in bringing on the difficulty, unless it be further shown that he intended to bring it on and to bring it on with felonious intent." (W.) "The court charges the jury that if they find from the evidence that the defendant is a man of good character, they must consider that character in connection with the other evidence in the case in determining his guilt, and it may generate a reasonable doubt of his guilt." (K.) "The court charges the jury that if the defendant acted in self-defense in the difficulty at the beginning, and even though he might have renewed it after the deceased retreated, yet if they believe that the defendant did not realize that the deceased had abandoned the difficulty, then they must acquit the defendant."

J. J. ALTMAN, for appellant, cited *Bell v. State*, 115 Ala. 25; *Simon v. State*, 108 Ala. 27; *Fountain v. State*, 98 Ala. 40; *Stone v. State*, 105 Ala. 63; *Kennedy v.*

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State, 85 Ala. 326; *Brown v. State*, 74 Ala. 478; *Eiland v. State*, 52 Ala. 322.

CHAS. G. BROWN, Attorney-General, W. B. OLIVER and S. W. JOHN, for the State, cited *Johnson v. State*, 102 Ala. 19; *McQueen v. State*, 103 Ala. 17; *Howard v. State*, 110 Ala. 95; *Linnchan v. State*, 113 Ala. 84; *Bains v. State*, 88 Ala. 91; *Kirby v. State*, 89 Ala. 63; *Ex parte Nettles*, 58 Ala. 274.

HARALSON, J.—1. There was no error in the court, of its own motion, excluding the juror, Steve Smith, from sitting on the jury, and in ordering him to stand aside. He showed on his examination, touching his qualifications, that he was on the grand jury when an indictment for an assault with intent to murder deceased, was found against the defendant for the same act with which he was now charged with murder, and was on defendant's bail bond for his appearance in this case.

It is well settled, that the enumerated causes for the challenge in the Code, are not exclusive of all others, and of the discretionary power of the court to set aside any one summoned as a juror, who, for any cause, appears to be unfit to serve as such. The rule is well stated by this court to be, that "it is the duty of the court, when it shall appear satisfactorily that any person called as a juror has not the requisite qualifications of integrity, impartiality, or intelligence, at any time before he has been elected by the State and defendant, to reject him. The State certainly has no interest, and the defendant has no right to introduce into the jury-box unfit persons. It is the duty of the court to guard against their introduction."—*Smith v. State*, 55 Ala. 1, 10; *State v. Marshall*, 8 Ala. 302; *Long v. State*, 86 Ala. 36, 40. So it has been held that a person who, as in this case, is bail for the defendant's appearance to answer the charge against him, is not competent to serve as a juror on his trial.—*Breazleton v. State*, 66 Ala. 97.

The case of *Bell v. State*, 115 Ala. 25, relied on by defendant's counsel, is not opposed to the principle above announced. There, the juror was not an unfit person,

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for any reason appearing, but was merely a witness in the case for the defendant, which fact did not disqualify or render him incompetent, to serve. It subjected him to challenge, under the statute, by either party, but for which cause, the court could not, of its own motion, set him aside.

The other cases referred to by counsel are alike inapplicable.

2. There was nothing of which the defendant can complain, that the court with the jury, the defendant, officers of court and attorneys, repaired from the court-room in the second story of the court-house, where the trial was being conducted, to the sheriff's office on the first floor of the court-house, for the purpose of examining a witness for the State, made known to the court to be suffering from rheumatism, and who could not be brought into the court-room without considerable pain to him. This fact was testified to by a physician. The statute,—Code, § 898,—provides, that the circuit courts of the several counties shall be held at the court-houses thereof. The sheriff's office was at the court-house of the county, and there is nothing in the statute which prevents the court being held temporarily, or even during the term, in the sheriff's office. The action of the court under the circumstances shown, was commendable and not subject to criticism or objection from any point of view.

3. Charge A. requested by defendant and refused has been too often condemned by us to require further consideration.—*Howard v. State*, 110 Ala. 94; *McQueen v. State*, 103 Ala. 13; *Johnson v. State*, 102 Ala. 3.

4. Charge 8 fails to set forth the constituents of self-defense, and its refusal may be justified on that account. *Miller v. State*, 107 Ala. 42; *Roden v. State*, 97 Ala. 55. Moreover, it was erroneous in that it postulates in effect, that no act of defendant, even if it had the effect to bring on the difficulty, should be considered against him, unless it be shown, "that he intended to bring it on with a felonious intent." Being wholly free from fault in bringing about a difficulty, cannot be made to consist in defendant's felonious intention. Still further,

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it ignores the question of reasonable mode of retreat or escape.—*Linehan v. State*, 113 Ala. 70.

5. Good character of the defendant may be considered in connection with all the other evidence in the case, and when thus considered, may generate a reasonable doubt of his guilt, when the other evidence without it might leave no such doubt; but it is improper to charge the jury that good character alone, without its consideration in connection with the other evidence in the case, may be considered to generate a reasonable doubt of guilt.—*Miller v. State*, 107 Ala. 59; *Thornton v. State*, 113 Ala. 44. Charge W. asked by defendant, while it postulated that the jury might consider defendant's good character in connection with the other evidence in the case, postulates that *it*, the good character, and not good character considered in connection with each other, might generate a reasonable doubt of guilt. When properly construed, the charge means that good character alone may generate a doubt of guilt, and was on this account erroneous.—*Johnson v. State*, 102 Ala. 2.

6. Charge K. was properly refused. It fails to set out the constituents of self-defense; and it contained the instruction, that if defendant renewed the difficulty after deceased abandoned it, as the evidence shows was the case, yet, if defendant did not realize that deceased had retired from the difficulty, then they should acquit. If it was a fact that deceased abandoned the difficulty, as the charge assumes he did, the defendant could not set up his want of realizing that he had done so, as an excuse to commence it again. He may have been greatly at fault in not having recognized the fact of abandonment of it by deceased. Renewal of it by defendant, if deceased abandoned the fight, as the evidence tends to show he did, and the charge admits, made him the aggressor *ab initio*, as to what followed.—*Hughes v. State*, 117 Ala. 26; *Stillwell v. State*, 107 Ala. 16.

7. We have examined the several charges given at the request of the State, and fail to find any reversible error in them.

There were many exceptions to the introduction and exclusion of evidence, which appear to be without merit.

Finding no reversible error in the record, let the judgment of the court below be affirmed.

[Charleston v. State.]

Charleston v. State.*Indictment for Murder.*

1. *Trial and its incidents; competency of juror.*—An assault with intent to murder is “an offense of the same character” as murder, within the meaning of the statute (Code, § 5016), defining the grounds of challenge of jurors in criminal cases; and when one who is summoned as a juror for the trial of the defendant under an indictment for murder, is shown to have an indictment for assault with intent to murder pending against him, it is proper for the court to sustain a challenge for cause of such juror.

APPEAL from the Criminal Court of Jefferson.

Tried before the Hon. DANIEL A. GREENE.

The appellant in this case was indicted, tried and convicted of murder in the first degree and sentenced to be hanged. The facts of the case pertaining to the only question reviewed on the present appeal are sufficiently stated in the opinion.

No counsel marked as appearing for the appellant.

CHAS. G. BROWN, Attorney-General, for the State, cited *Crocker v. State*, 38 Ala. 387; *Johnson v. State*, 29 Ala. 62.

TYSON, J.—The only exception reserved upon the trial was to the ruling of the court sustaining a challenge for cause by the State of a juror on the ground that there was pending in the trial court an indictment against him, preferred within the last twelve months, for an assault with intent to murder.

Subdivision 3 of section 5016 of the Criminal Code prescribes as one of the grounds of challenge for cause of a juror, “that he has been indicted within the last twelve months for an offense of the same character as

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that with which the defendant is charged." This identical point was ruled upon in the case of *Crockett v. The State*, 38 Ala. 387, and the challenge sustained. It was there said: "An assault with intent to commit murder, is an offense of the same character as murder. They differ only in this, that in murder the purpose is accomplished. The will and the tendency of conduct are precisely the same in both cases. The identity of 'character' between the two offenses is as manifest, as between an assault and a battery; and the question here is the same with that which would arise, if one indicted for an assault had been challenged on the trial of one charged with a battery."

There is no error in the record, and the judgment must be affirmed.

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Indictment for Murder.

1. *Trial and its incidents; motion in arrest of judgment must be shown by the record.*—A motion in arrest of judgment must be presented to the Supreme Court for revision by the record; and when such motion appears only in the bill of exceptions it will not be considered on appeal.
2. *Same; sufficiency of verdict of jury.*—On a trial under an indictment for murder, a verdict of the jury that "We, the juror, find the defendant guilty of murder in the first degree and shall suffer death," though not in proper form, is sufficient to support a judgment of the court adjudging the defendant guilty of murder in the first degree, and a sentence that he be hanged.
3. *Same; agreement between counsel not binding upon jury.*—On a trial under an indictment for murder, where it is agreed between the solicitor for the State and the defendant that the defendant shall withdraw his plea of not guilty and enter a plea of guilty, and that the solicitor should state to the jury that the State would be satisfied with the sentence of life imprisonment, as a punishment, such agreement is not binding upon the jury and amounts to nothing

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- more than a recommendation; and if the jury declines to carry out such agreement and by their verdict imposes the death penalty, such verdict of the jury is valid and binding.
4. *Same; where motion for new trial not revisable.*—The ruling of the trial court on motion for a new trial in a criminal case is not revisable on appeal.

APPEAL from the County Court of Tuskaloosa.

Tried before the Hon. J. J. MAYFIELD.

The appellant in this case, Ben Durrett, was indicted, tried and convicted of murder in the first degree and sentenced to be hanged. It appears from the bill of exceptions that there was a motion made by the defendant in arrest of judgment, but this motion is not shown by the record, and appears no where except in the bill of exceptions. The other facts of the case are sufficiently shown in the opinion.

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State. The ruling of the trial court upon the motion in arrest of judgment not being shown by the record will not be reviewed on appeal.—*Diggs v. State*, 77 Ala. 68; *Thomas v. State*, 94 Ala. 75.

The verdict of the jury was sufficient.—*Noles v. State*, 26 Ala. 31; *Harrall v. State*, 26 Ala. 52; *Robinson v. State*, 54 Ala. 86.

DOWDELL, J.—In this case, as in the case of *Diggs v. State*, 77 Ala. 68, the motion in arrest of judgment and the ruling of the court thereon do not appear otherwise than from the bill of exceptions. A motion in arrest of judgment is based on error of law apparent on the face of the record. The error or defect is one shown in the record proper,—the record which the law requires to be preserved in permanent form, as, for instance, the judgments of the court. In *Diggs v. State*, *supra*, it was said: "It has been repeatedly held by this court, that it is not the appropriate office of a bill of exceptions to present for revision any matter which otherwise would appear of record. It will not be permitted to assume the office

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of the record, which the law requires the court to keep, where no bill of exceptions is resorted to, and on which it cannot trench. Any matter apparent on the record, as a defect in the indictment, sustaining a demurrer to any plea of the defendant, or overruling a motion in arrest of judgment, must be presented for revision by the record, without the aid of a bill of exceptions," citing *Ex parte Knight*, 61 Ala. 482; *Petty v. Dill*, 53 Ala. 641. See also *Thomas v. State*, 94 Ala. 75.

The verdict of the jury read as follows: "We the juror find the defendant guilty of murder in the first degree, and shall suffer death." While the verdict was not in proper form, yet it was sufficient to support the judgment of the court.—*Noles v. State*, 24 Ala. 672; *Noles v. State*, 26 Ala. 31; *Harrall v. State*, 26 Ala. 52; *Robinson v. State*, 54 Ala. 86.

After issue joined on the plea of not guilty and the evidence for the State and defendant had closed, the defendant entered into an agreement with the solicitor for the State, to withdraw his plea of not guilty and enter a plea of guilty, and for the solicitor to state to the jury that the State would be satisfied with a sentence to life imprisonment as a punishment. This agreement was carried out by the solicitor, but the jury declined to carry it out, and by their verdict imposed the death penalty. It was the province and duty of the jury under the law to fix the punishment, and the agreement of the solicitor could be nothing more than a recommendation to the jury. In no sense, under the law, was it binding on them.

Ruling on motion for new trial in a criminal case is not revisable on appeal.

We find no error in the record, and the judgment must be affirmed.

[White v. The State.]

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Indictment for Murder.

1. *Organization of petit jury in capital case; excusing juror no ground for quashing venire.*—The fact that one who was summoned as a regular juror for the week in which the defendant in a capital case was tried, and whose name was on the list served upon the defendant, was excused by the court in the organization of the regular juries for the said week and was not in attendance on the day of the defendant's trial, constitutes no ground for quashing the venire.
2. *Homicide; when production of bundle of clothing during trial without injury to defendant.*—Where on a trial under an indictment for murder, the court, at the request of the solicitor, had a bundle of clothing found at the house of the defendant's co-defendant produced in court, and such bundle was laid where the jury could see it, but it is not shown that the bundle was opened and its contents exposed to the jury, no injury resulted to the defendant from such action on the part of the court.
3. *Same; admissibility of evidence.*—Where on a trial under an indictment for murder, a physician testified that he had had considerable experience in examining blood spots, and had examined the defendant's leggings which were worn by him on the day of the homicide, it is competent for such witness to testify that the stains found on the leggings looked like blood stains.
4. *Confession; when shown to be voluntary.*—Where a witness testifies that he did not make any promises or threats to the defendant to induce him to make the statement, and that while the defendant was in jail, the witness, who was county physician, while visiting a sick prisoner, talked with the defendant and asked him what made him commit the crime for which he was charged, whereupon the defendant proceeded to make a statement which implicated him as guilty of the crime charged, such statement is shown to have been voluntarily made and is admissible in evidence; the fact that the defendant was under arrest and made the state-

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ment to the witness in answer to the question that assumed his guilt, not rendering such statement inadmissible as a confession.

5. *Charge as to reasonable doubt.*—In a criminal case, a charge which instructs the jury that in order to convict they must find that "there is no other possible or reasonable conclusion to be reached but that of the defendant's guilt," is erroneous and properly refused.
7. *Homicide; conspiracy; charge to the jury.*—On a trial under an indictment for murder, where there was evidence tending to show that the defendant and another party acted in concert in killing the deceased, a charge which instructs the jury that "no matter how strong the circumstances may be in this case, if they can be reconciled with a theory that some other person did the killing charged against the defendant," the jury should acquit him, is erroneous and properly refused.
8. *Charge relating to argument of counsel properly refused.*—It is not error for the court to refuse to give charges having no other purpose than to respond to or off-set the argument made before the jury by the prosecuting officer.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. A. H. ALSTON.

The appellant, Sam White, was jointly indicted with one Florence Kimbrough for the murder of Mary Williams, was tried separately, was convicted of murder in the first degree and sentenced to the penitentiary for life.

When the case was called for trial the defendant moved the court to quash the venire served upon him upon the ground that one C. Knight, whose name was upon the list of jurors served on the defendant for his trial in this case, was excused by the court from serving on the jury; that he was so excused without the knowledge or consent of the defendant; that the ground for excusing him was that he had served as a juror in a justice of the peace court within twelve months, but that said Knight came to court and offered to serve as a juror during the week defendant was tried, but was excused by the court without legal cause or excuse therefor, and that the defendant was deprived of the right to pass upon said Knight as a juror on his trial. The facts as stated in the motion were admitted to be true. The court over-

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ruled the motion, and the defendant duly excepted. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (6.) "The jury must find from the circumstances relied on in this case, in order to convict, that there is no other possible or reasonable conclusion to be reached but that of defendant's guilt, and if you do not so find, then the State has failed to make out a case, and it is your duty to acquit the defendant." (11.) "The court charges you, gentlemen, that no matter how strong the circumstances may be in this case, if they can be reconciled with the theory that some other person did the killing charged against the defendant, then defendant's guilt is not established by that full measure of proof required by law, and the jury should acquit him." (18.) "The uncontroverted testimony in this case is that Mary Williams asked the defendant to go with her from the place where White overtook the deceased, to the house where the body of deceased was found."

TATE & WALKER, for appellant, cited *Evans v. State*, 80 Ala. 4; *Lacy v. State*, 58 Ala. 385; 3 Brick. Dig., 285, § 556; *Ex parte Acree*, 63 Ala. 234; *Brown v. State*, 118 Ala. 111; *Rogers v. State*, 117 Ala. 192; *Riley v. State*, 88 Ala. 188; *Pickens v. State*, 115 Ala. 42.

CHAS. G. BROWN, Attorney-General, and JOHN F. PROCTOR, for the State.—The court properly overruled the motion to quash the venire.—Code of 1896, § 4988; *Johnson v. State*, 47 Ala. 9; *Shelton v. State*, 73 Ala. 5; *Johnson v. State*, 94 Ala. 35; *Farris v. State*, 85 Ala. 1; *Maxwell v. State*, 89 Ala. 150; *Pierson v. State*, 99 Ala. 148; *Moseley v. State*, 107 Ala. 74; *Thomas v. State*, 124 Ala. 48; *Byers v. State*, 105 Ala. 31.

The confession testified to by Dr. Boyd was shown to have been voluntary and was properly admitted in evidence. The mere fact that the interrogator of the de-

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fendant by his questions assumes that the defendant is guilty does not render his answers inadmissible.—*McQueen v. State*, 94 Ala. 50; *Spicer v. State*, 69 Ala. 159; *Grant v. State*, 55 Ala. 201.

Dr. Boyd's testimony in reference to blood stains on defendant's leggings was an opinion, based upon his observation and examination of the thing about which he testified, and whether he was shown to be an expert or not makes no difference.—*K. C., M. & B. R. R. Co. v. Crocker*, 95 Ala. 412; *A. G. S. R. R. Co. v. Hall*, 105 Ala. 599; *Walker's case*, 58 Ala. 393; *L. & N. R. R. Co. v. Sandlin*, 125 Ala. 585; Rogers on Expert Testimony, §§ 47, 60.

The court properly refused the charges requested by the defendant.—*Scott's case*, 96 Ala. 20; *Turner's case*, 124 Ala. 59; *Mitchell v. State*, 129 Ala. 23.

HARALSON, J.—There was no error in overruling the defendant's motion to quash the *venire*, based on the ground that the court had, without defendant's consent, excused a juror whose name was on the list served on him for his trial. It is shown that no such ground existed.

What the production of the bundle of clothing found at the house of Kimbrough, a co-defendant, not here on trial, had to do with the case is not made to appear. The court, at the request of the solicitor, had the bundle produced, and it was laid where the jury could see it, but it does not appear that the bundle was opened or its contents exhibited to the jury. No possible injury could have resulted to the defendant from what was done.—Code, § 4333. It may be presumed, the bundle was produced for its contents to be used, if in the progress of the trial, it was shown to be proper to do so, which was not done.

Dr. Boyd was examined as a witness for the State, and testified that he had been practicing medicine for about two years, and was a county physician; that he had had considerable experience in examining blood spots, and had examined the defendant's leggings with a low power lens; that he went with the coroner's jury on the morning the dead woman was found, and was asked by

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the solicitor what he found on the defendant's leggings. He answered, that he found some stains on them that looked like blood; that he made no microscopical examination of the stains, and could not swear positively that it was blood—could only swear that these stains looked like blood. The leggings were introduced in evidence by the defendant. The defendant when said question was propounded to the witness, objected to it because it was not shown that the witness had the knowledge to qualify him to testify as an expert; that it was not shown that he had made the proper examination to enable him to testify as to what was on defendant's leggings, and because such testimony was immaterial and inadmissible, and he moved to exclude the answers on the same ground, but his objections were overruled. Whether he was an expert or not, and competent to express the opinion he did as to these stains, was a matter addressed to the discretion of the court, and the province of the court to determine. He gave it as his opinion, based on his experience in examining blood spots, that they looked like the stains of blood. The force and value of this opinion, was open to be combatted by other proof, that the opinion was worthless, and its value was for the jury to determine, in connection with all the evidence.—*Gulf C. Ins. Co. v. Stephens*, 51 Ala. 123; *Walker v. The State*, 58 Ala. 393; *L. & N. R. Co. v. Sandlin*, 125 Ala. 591.

This witness was asked by the solicitor, if defendant had made a statement to him concerning the homicide; how and by whom it was done, and witness answered that he had made such a statement. Upon objection by defendant to the witness making the statement to the jury, the court ordered the jury to retire, which they did. The court then asked the witness, if he had made any promise or threats to defendant to induce him to make a statement, to which witness replied that he had not; that being county physician, he was at the jail to visit a sick prisoner, and while there he saw defendant and inquired of him, how he was getting along, and how his troubles were serving him, and he replied, he was getting along very well; that he then asked him, what

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made him do that, when defendant replied, that he was not guilty, did not kill the woman and did not have anything to do with it. Without more, he said, "I will tell you how it was," and proceeded to make the statement which the witness detailed in court, such as is set out in the transcript, and which, upon return of the jury to the court room, the court allowed to be repeated to them by the witness as evidence in the cause.

This evidence, which tended to implicate defendant as a guilty party in the homicide, was properly admitted. The fact that he was under arrest, and that he made the statement to the witness in answer to a question that assumed his guilt, did not render it inadmissible as an admission or confession.—*Carroll v. State*, 23 Ala. 28; *Redd v. State*, 68 Ala. 492; *Miller v. State*, 40 Ala. 54; *McQueen v. State*, 94 Ala. 50.

The sixth charge was properly refused. In order to convict, the law does not require that there can be no other possible conclusion to be reached but that of defendant's guilt. Reasonable doubt of guilt is all that can be required for an acquittal.—*Scott v. State*, 95 Ala. 20; *Karr v. State*, 106 Ala. 1.

Charge 11 was properly refused, when construed with reference to the evidence. The tendencies of the evidence was, that the defendant and Florence Kimbrough acted in concert in effecting the death of the deceased, and while Kimbrough may have struck the blow that killed her, that defendant was implicated in the matter and aided and abetted therein.—*Pickens v. State*, 115 Ala. 43, 51.

Charge 18 was improper. The confessed purpose of the charge was to refute some remarks of the solicitor in his closing argument; and it is not error in the court to refuse a charge having no other purpose than to respond to or offset arguments made before the jury by the prosecuting officer.—*Mitchell v. State*, 129 Ala. 23.

Let the judgment and sentence below be affirmed.

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Indictment for Murder.

1. *Minute entry; when presence of defendant shown thereby.*
The minute entry of the arraignment of a defendant under an indictment for murder, which recites that "the defendant being in open court attended by his counsel and being duly arraigned," etc., then continues showing the order of the court setting the day for trial and the drawing of the special venire, and then sets out the rulings of the court upon the motions to quash such special venire, sufficiently shows the presence of the defendant, when the several motions to quash were ruled upon by the court.
2. *Organization of special venire; when properly quashed.*—When in the drawing of names of persons to serve as special jurors for the trial of a capital case, the names of persons who were drawn for the regular petit juries for the week in which the trial was to be had are placed upon the venire, the venire thus drawn is improper and the court should, on motion of the solicitor, quash it and proceed to draw another from the jury box.
3. *Same; same; error for court to put back in box names of jurors drawn for special venire.*—It is error for the court to replace in the jury box the names of jurors drawn to serve upon a special venire, and when after this is done, a special venire is drawn to try another capital case, and upon it appears the names of the jurors which were drawn upon a former special venire, the second special venire will, upon motion properly made, be quashed.
4. *Same; venire not quashed by reason of mistake in name of one of the jurors.*—A mistake in writing the name of one who was drawn as a special juror to try a capital case, furnishes no ground for quashing the special venire; and the court has authority under the statute (Code, § 5007), to correct this mistake by discarding the name of the person so drawn and ordering another to be forthwith summoned to supply his place.
5. *Same; not necessary for list served on the defendant to show which are special and regular jurors.*—The fact that the list of jurors served upon the defendant in a capital case does not designate the names of jurors specially drawn and those drawn and summoned for the week of the court

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in which the trial is to be had, constitutes no ground for quashing the venire; the statute (Code, §§ 5004, 5273) not requiring such designation.

6. *Homicide; admissibility of evidence.*—Where on a trial under an indictment for murder, it was shown that the deceased was killed on a road which ran by the defendant's house, and there was some evidence tending to show that the deceased had passed along said road going to a house beyond the defendant's only a short time before the killing, and there was some evidence tending to show that the defendant had a grudge against the deceased, it is competent for the State to ask a witness who was shown to have been familiar with the location and distance about the scene of the killing, that if a person left the house of the deceased and went along the road to the place of the killing, if there were any obstructions to prevent such person from being seen from the defendant's house.
7. *Homicide; plea of insanity; admissibility of evidence.*—On a trial under an indictment for murder, where the defendant pleads not guilty, and not guilty by reason of insanity, acts and declarations of the defendant subsequent, as well as previous to the killing, are admissible in evidence to show his true mental condition at the time of the homicide.
8. *Homicide; admissibility of evidence.*—On a trial under an indictment for murder, where the defendant sets up the plea of self defense, declarations made by the defendant to a third party, in which he states that the deceased was mad with him and was anxious to get rid of him, the defendant, in order that he could commit an offense which the defendant interfered with, are admissible in evidence.
9. *Same; same.*—On a trial under an indictment for murder, where the defendant sets up self defense, and there is evidence tending to establish such defense, it is competent for the defendant, upon being examined as a witness in his own behalf, to testify that the deceased was in the habit of carrying a pistol.
10. *Homicide; self defense; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads self defense, charges requested by the defendant, which assume as matter of law that facts postulated therein created imminent peril to life or limb, invade the province of the jury, whose duty it is to determine whether the defendant was in imminent peril, and such charges are properly refused.

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11. *Same; charge as to reasonable doubt.*—In a criminal case, a charge which instructs the jury that a reasonable doubt "is a doubt for which a reason can be given," is properly refused, being calculated to confuse and mislead the jury.
12. *Same; plea of self defense and insanity; charge to the jury.* On a trial under an indictment for murder, where the defendant pleads not guilty and not guilty by reason of insanity, and the two issues are submitted and tried at the same time, a charge is erroneous and properly refused which instructs the jury that "if the jury believe from the evidence that the defendant committed the act under circumstances which would be criminal or unlawful if he was sane, the verdict should be not guilty, if the killing was an offspring or product of mental disease in the defendant."
13. *Same; self defense; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads self defense, a charge is erroneous and properly refused which instructs the jury that "if the defendant did not provoke or bring on the difficulty, and the deceased advanced upon him drawing his hand from his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw and fire, the defendant was authorized to anticipate him and fire first."
14. *Same; plea of insanity; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads not guilty by reason of insanity, a charge is erroneous and properly refused which instructs the jury that even if they should believe from the evidence that the defendant at the time of the killing had the capacity to distinguish between right and wrong, "yet if the jury should believe from the evidence that defendant was moved to action by the insane impulse controlling his will or judgment, then he is not guilty of the offense charged."

APPEAL from the Circuit Court of Lee.

Tried before the Hon. A. A. EVANS.

The appellant, John P. Cawley, was indicted and tried for the murder of Brady Jones by shooting him with a gun, was convicted of manslaughter in the first degree and sentenced to the penitentiary for ten years.

The defendant was arraigned on October 21, 1901. The judgment entry of said date recites as follows: "The defendant being in open court, attended by his counsel and being duly arraigned according to law

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pleads 'not guilty,' and also 'not guilty by reason of insanity.'" The minute entry then recites that October 28, 1901, was set as the day for the trial of the defendant. It then contains the order of the court for the drawing of fifty names to serve on the special venire. The minute entry then proceeds to recite that the State, through its solicitor, moved the court to quash the special venire upon the grounds that certain names were drawn from the jury box by the court at the spring term, 1901, of said circuit court as special jurors for the trial of another murder case, and that after so drawing said special jurors, the court restored said names to the jury box and the same names had been drawn from said box as special jurors in the present case; and that proof of the facts alleged in the motion being made, the court sustained the motion and the special venire was quashed. The minute entry then shows the following proceedings: The court ordered the box containing the names of the jurors to be brought into the court room and drew therefrom fifty names to serve as special jurors for the trial of the defendant. The State moved to quash the special venire so drawn upon the ground that certain persons drawn upon said venire had been drawn and summoned to serve as regular petit jurors for the week in which the trial of the defendant had been set, and that the names of such persons appear both upon the special venire and upon the list of those persons served and summoned as jurors for the week of the court. The facts alleged in this motion being shown to the court, the court sustained the motion and the special venire was quashed. Thereupon the court proceeded to draw from the jury box another list of fifty names to serve on the special venire and ordered the same served upon the defendant.

When the case was called for trial on October 28, the day set for the trial of such case, the defendant moved the court to quash the special venire drawn and summoned in said case, and assigned eight grounds for said motion. The first and second grounds were the ruling of the court in quashing the special venire drawn on October 21. The third, fourth and fifth grounds were that the list of jurors served on the defendant did

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not contain the name of "W. D. Graves" nor of the jurors drawn and summoned to serve on the regular petit jury for the week the trial of the defendant was to be had, but that said list of jurors served upon the defendant did contain the name of one "W. D. Garves," who was not drawn and summoned upon either the special venire or the regular petit jury for said week. The sixth and seventh grounds of the motion were not supported by the evidence, and it is unnecessary to set them out. The eighth ground of the motion was that the list of jurors served on the defendant fails to show what persons had been drawn and summoned to serve as petit jurors for the week the defendant was to be tried.

The allegations contained in the first and second grounds of the motion were admitted to be true. In support of the third, fourth and fifth grounds of the motion, it was shown that a mistake had been made in transcribing the name of W. D. Graves, who was drawn as a special juror upon the list served upon the defendant, and his name was written "W. D. Garves." Thereupon the court directed the name of such person to be discarded, and the name of another person forthwith summoned to serve in the same case, and the person so summoned was disposed of in the same manner as if he had been drawn in the first instance. In support of the eighth ground it was shown that the list of jurors served on the defendant did not show who were the jurors drawn and summoned for the week of the court in which the defendant was to be tried, or who were the special jurors drawn for the trial of the case, but that the list of jurors served on the defendant contained the names of the jurors drawn and summoned for the third week of the court, together with the names of the special jurors drawn for the trial of the case. The defendant's motion to quash was overruled, and to this ruling the defendant duly excepted.

The evidence for the State tended to show that as the deceased, Brady Jones, was walking along what is called a plantation road, he met the defendant Cawley; that as Jones saw said Cawley he stooped and started to run; that thereupon Cawley shot and killed him. It was shown that the plantation road ran between the

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house of defendant and one Sylla Griggs; that the distance from Cawley's house to where the shooting occurred was about 200 yards. It was further shown that the killing occurred about 6 o'clock in the morning; that the deceased had been to the house of Sylla Griggs to see her about picking some cotton for him, and was returning from her house when he was shot.

One H. G. Adams, a witness for the State, testified to the location of the road and how it was situated in regard to Cawley's house and to Sylla Grigg's house, and he showed to the jury by a drawing on paper the relative location and distances of the several places about which he had testified. The State then asked the witness Adams the following question: "A person leaving Jones' house and going into the plantation road and thence along said road to where the body of Jones was found, is there any obstruction to prevent such person from being seen from said house?" The defendant objected to this question, because it called for illegal, incompetent and immaterial evidence, and called for the conclusions of the witness. The court overruled the objection, and the defendant duly excepted. The witness answered that there was not. The defendant duly excepted to the court's overruling his motion to exclude this answer of the witness.

The evidence for the defendant tended to show that as he and his son were walking along the plantation road they met Jones, the deceased; that as Jones came toward the defendant the latter told him to stop, but that Jones kept advancing and put his hand in his pocket and moved as if to draw it out, and that thereupon the defendant fired upon him.

The sister of the defendant was introduced as a witness and testified that she was a widow and that Brady Jones had had illicit relations with her daughter, who was unmarried; that the defendant, who was her brother, was her protector, and she had asked him to keep Jones away from her daughter, and that after this request the defendant seemed very much depressed. There was also evidence introduced for the defendant tending to show that after the request was made by the sister of the defendant, he seemed to be unable to talk about anything else except the relations existing between his

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niece and the said Jones, and that he seemed to be brooding over it all the time. There was also evidence introduced for the defendant that the deceased had made threats against the defendant. Upon the introduction of one Huguley as a witness, he was asked the following question: "Did you have a conversation with defendant about the deceased several months ago?" Upon the witness answering that he did, he was then asked by the defendant to state the conversation. The witness answered: "Defendant said that Brady Jones had it in for him, and if he, the said Brady Jones, could get defendant out of the way, he could do Sister Sallie as he pleased." The State moved to exclude this answer upon the ground that it was irrelevant, incompetent and immaterial. The court overruled the motion, and the State duly excepted.

During the examination of the defendant as a witness in his own behalf, he was asked the following question: "If the deceased was not in the habit of carrying a pistol?" The State objected to this question upon the ground that it was illegal, irrelevant and incompetent. The court overruled the objection. The defendant then answered: "Yes; I saw him with one on several occasions since February, 1901, sticking out of his pocket." The State moved to exclude the answer of the witness upon the ground that it was illegal, irrelevant and incompetent, and because the deceased had a right to carry a pistol not concealed. This motion was sustained by the court, and the evidence was excluded, and to this ruling the defendant duly excepted.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (b.) "If the defendant was free from fault in bringing on the difficulty, and the deceased advanced toward him at the same time drawing his hand from his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw his pistol and fire upon the defendant, and if the accused was in such close proximity to the deceased as to render it hazardous to attempt flight, then the law would not require the defendant to endanger his safety by attempting flight." (c.) "A rea-

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sonable doubt, gentlemen, is a doubt for which a reason can be given." (d.) "If the jury believe from the evidence that defendant committed the act under circumstances which would be criminal or unlawful if he was sane, the verdict should be not guilty, if the killing was an offspring or product of mental disease in the defendant." (e.) "If the defendant did not provoke or bring on the difficulty, and the deceased advanced upon him, drawing his hand from his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw and fire, the defendant was authorized to anticipate him and fire first." (f.) "If from previous threats made by the deceased and communicated to defendant and from deceased carrying a gun, the defendant was reasonably led to believe that on first meeting one of them would be killed, and if at the time of the meeting when deceased was shot, the deceased advanced upon the defendant, and placed his hand in his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw a pistol and fire, then the defendant would be authorized to fire upon the deceased first, if his danger would have been increased by retreat." (g.) "If the defendant was not at fault in bringing on the difficulty, and if the defendant from previous acts and threats of the deceased was reasonably led to believe that on first meeting the deceased would attempt to kill him, and if at the time of the fatal meeting, the deceased advanced upon the defendant and placed his hand in his pocket and attempted to draw it in such a manner as to indicate to a reasonable mind that his purpose was to draw a pistol and fire, and if he was in such proximity to the deceased as that retreat would have increased his danger, then the defendant would have been authorized under the law to anticipate him and fire first." (h.) "Even if the jury should believe from the evidence that the defendant at the time of the alleged killing of Brady Jones had the capacity to distinguish between right and wrong, yet if the jury should believe from the evidence that defendant was moved to action by an insane impulse controlling his will or judgment, then he is not guilty of the offense charged."

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BARNES & DUKE, for appellant.—The judgment entry shows that a motion was made to quash the venire, and the motion was denied, and it is not shown that at this time the defendant was present in court. It is the undoubted right of the accused to be present in all stages of the prosecution in which any action is to be taken, in reference to which he has the right to be heard by himself or counsel.—*Ex parte Bryan*, 44 Ala. 402; *Sylvester v. State*, 71 Ala. 17.

Under the defendant's plea of insanity, it was competent for him to prove that the defendant was brooding in mind over a condition of affairs at his sister's (Mrs. Taylor's) house, real or imaginary, to such an extent that his mind had become impaired and deranged. It was competent to make this proof by showing his acts and conversations at and prior to the time of the killing.—*McLean v. State*, 16 Ala. 672; *State v. Brinyea*, 5 Ala. 241; *Norris v. State*, 16 Ala. 776; *Lawson's Insanity as a Defense to Crime*, 797.

In one aspect of the case the defendant set up self-defense, and there was some evidence, abundant evidence, we might say, in support of his plea of self-defense. Then it was competent for the defendant to show by proper evidence that the deceased was in the habit of carrying a pistol.—*Naugher's Case*, 116 Ala. 463; *Wiley's Case*, 99 Ala. 146.

CHAS. G. BROWN, Attorney-General, for the State. The court properly quashed the venire on motion of solicitor.—*Wilkins v. State*, 112 Ala. 55.

It is manifest that the court did not err in sustaining the objection to conversation defendant had with one Huguley. It had no connection with any circumstances brought out by the State and had not the remotest bearing on the question of insanity. It was not introduced for that purpose. It clearly was allowing defendant to make testimony for himself.—*Naugher v. State*, 116 Ala. 463; *Wiley v. State*, 99 Ala. 146.

The charges requested by the State were properly given.—*Evans v. State*, 109 Ala. 13; *Compton v. State*, 110 Ala. 7; *Bell v. State*, 115 Ala. 25; *Linnehan v.*

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State, 116 Ala. 454; *Stoball v. State*, 116 Ala. 455; *Miller v. State*, 107 Ala. 40.

TYSON, J.—The recitals in the minute entry sufficiently show the presence of the defendant when the several motions to quash the several *venires* were ruled upon by the court. No exception is shown to have been reserved by defendant to the action of the court in quashing the *venires* on motion of the solicitor. As sustaining the correctness of the ruling of the court in this respect, see *Wilkins v. The State*, 112 Ala. 55.

In respect to the refusal of the court to quash the *venire* on defendant's motion, only those grounds of the motion are insisted upon which go to the right of the court to discard the name of one W. D. Graves, who was drawn as a special juror and to order another to be forthwith summoned to supply his place. It was made to appear to the trial court, as shown by the record, that the name of W. D. Graves was drawn from the box as a special juror and that in the list of jurors delivered to defendant, the name was written "W. D. Garves." For the correction of this mistake the court had ample authority under the provisions of section 5007 of the Code, which it followed.

The other grounds of the motion, except the eighth, were not supported by the evidence, and, therefore, there was no error in overruling them. While the facts alleged in the eighth ground were proven, it can avail the defendant nothing, since there is no requirement that the list of jurors served on defendant shall designate the names of those jurors specially drawn and those drawn and summoned for the third week of the court, the names of all being upon the list served upon him.—Code, §§ 5004, 5273.

The record does not contain a copy of the drawing made by witness Adams, which was before the court, showing the relative location and distances of the places named by him. Nor does the evidence in the record disclose affirmatively that Jones, upon leaving his home, did not go into the plantation road and thence along it to the point where his body was found. We cannot, therefore, know, as insisted by appellant's

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counsel, that he came to the place where he was killed by a different route and from an opposite direction. Since error must be affirmatively shown to overcome the presumption which must be indulged in favor of the correctness of the rulings of the trial court, and as the question to which an objection was interposed was doubtless propounded by the solicitor for the purpose of showing that the defendant saw Jones, the deceased, as he went along the plantation road from his own house, and pursued him, it was entirely competent and relevant.

Two defenses were relied upon by defendant—one, self-defense, and the other insanity. There was testimony offered by the defendant tending to show, the weight of which was for the jury, that he had been previously to and was at the time of the killing of the deceased, afflicted with a mental disease produced solely by the information imparted to him of a supposed illicit relation between his niece and the deceased. When insanity is pleaded, the subsequent as well as previous acts and declarations of the defendant are admissible in evidence to show his true mental condition at the moment of the homicide.—*McLean v. The State*, 16 Ala. 672; 1 Mayfield's Dig., 460, § 48.

The declarations of defendant to witness Huguley should not have been excluded.

In view of the testimony tending to establish the defense of self-defense, the court committed an error in excluding the statement of defendant as a witness that deceased was in the habit of carrying a pistol.—*Wiley v. The State*, 99 Ala. 146; *Naugher v. The State*, 116 Ala. 463.

Written charges b, f, and g, refused to defendant, were bad. They assumed as matter of law that the facts postulated created imminent peril to life or limb, thus invading the province of the jury whose duty it was to determine whether the defendant was in imminent peril, actual or apparent.—*Gilmore v. The State*, 126 Ala. 21.

Charge c was condemned in *Avery v. The State*, 124 Ala. 20.

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Charge d was properly refused upon the authority of *Marwell v. The State*, 89 Ala. 150.

Charge e is so obviously defective no comment is necessary.

Charge h is in conflict with the principle often declared by this court, that emotional insanity as a defense "finds no justification or support in our jurisprudence."—*Walker v. The State*, 91 Ala. 76; *Parsons v. The State*, 81 Ala. 577; *Boswell v. The State*, 63 Ala. 307.

For the errors pointed out the judgment must be reversed and the cause remanded.

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Indictment for Murder.

1. *Organization of jury; challenge of juror.*—The grand jury which preferred an indictment against the defendant also preferred indictments against several other parties charged with the same offense with which the defendant was charged. The several indictments against the other parties were pending in the court and said other persons were in custody awaiting trial under said indictment. In selecting the jury for the trial of the defendant, two of the jurors, upon being examined on their *voir dire*, testified that they were second cousins to two of the other persons who were indicted for the same offense as was the defendant. *Held*: That such relationship was a ground for challenge for cause of said jurors, and the court did not err in permitting the State to challenge said jurors for cause.
2. *Charge as to reasonable doubt.*—On the trial of a criminal case, a charge which instructs the jury that if they "have a reasonable doubt as to the conclusions of the proof of any single fact, which it is necessary for the State to prove, they must acquit the defendant," is confusing and calculated to mislead the jury, and for these reasons is properly refused.
3. *Charge to the jury; must be complete in itself.*—A charge requested to be given to the jury must be complete in itself; and a charge which instructs the jury that "a reasonable * * * is a doubt which naturally arises in the mind in

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considering the evidence," is properly refused because it is incomplete.

4. *Charge of court to jury.*—In the trial of a criminal case, a charge which instructs the jury that "the proof of suspicious facts against the accused, does not even require him to rebut it, and the jury can not convict on suspicious facts merely," is erroneous and properly refused, in that it assumes the proof of suspicious facts and at the same time ignores other evidence in the case.
5. *Evidence; admissibility of declarations and conduct of conspirators.*—When the evidence introduced in a criminal case is such as would justify the jury in reasonably inferring the existence of a conspiracy between the defendant and other persons to commit the crime with which the defendant is charged, the acts, declarations and conduct of the other conspirators, in promotion of the purpose of the conspiracy, or in furtherance of the common design to commit the crime, are competent and admissible as evidence against the defendant.

APPEAL from the Circuit Court of Elmore.

Tried before the Hon. N. D. DENSON.

The appellant, John Thomas, was jointly indicted with Tom Murphy for the murder of Robert White by hanging him by the neck with a rope, was convicted of murder in the second degree, and sentenced to the penitentiary for ten years. The indictment was preferred at a special term of the circuit court. At this term, thirteen other persons were convicted for the murder of said Robert White. The facts relating to the organization of the jury are sufficiently stated in the opinion.

There was evidence introduced by the State tending to show that a conspiracy existed between the defendant and several other persons for the capture and lynching of said Robert White. After the introduction of such evidence, the State asked several different witnesses to tell what was said and done by the defendant and the others after the capture of said White and before he was hung. The defendant separately objected to each of these questions, upon the ground that such evidence was incompetent, illegal and immaterial. The court overruled each of the objections, and the defendant separately excepted.

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Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (19.) "If the jury have a reasonable doubt as to the conclusions of the proof on any single fact, which it is necessary for the State to prove, they must acquit the defendant." (16.) "A reasonable * * * is a doubt which naturally arises in the mind in considering the evidence." (18.) "The proof of suspicious facts against the accused does not even require him to rebut it, and the jury can not convict on suspicious facts merely."

W. M. LACKEY, for appellant.—The relationship of the jurors and the other persons who were indicted for the same offense with the defendant did not constitute a ground of challenge for cause.—*Jones v. Drewry*, 72 Ala. 311; *Yneistra v. Tarleton*, 67 Ala. 129; *Carlisle v. Goodwin*, 68 Ala. 137.

The court erred in refusing the charges requested by the defendant.—*Wharton v. State*, 73 Ala. 366; *Tatum v. State*, 63 Ala. 147.

CHAS. G. BROWN, Attorney-General, and S. L. BREWER, for the State.—The relationship of the jurors to other persons indicted for the same offense with which the defendant was charged constituted a ground for challenge. That such jurors were related by affinity within the fifth degree can not be questioned.—*Danzey v. State*, 126 Ala. 15; 28 So. Rep. 697; *Kirby v. State*, 89 Ala. 63.

The answer to the position, or contention, of the appellant is that the enumerated grounds of challenge for cause are not exclusive of all others, and if it can be made to appear that the juror was not a fit person to serve as a juror in the case, the court had the unquestionable right in the interest and furtherance of justice, *ex mero motu*, to stand the juror aside, or to allow the State to challenge him for cause.—*State v. Marshall*, 8 Ala. 302; *Williamson v. Mayer Bros.*, 117 Ala. 253; *Griffin v. State*, 90 Ala. 596; *Smith's Case*, 55 Ala.

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1; *Dothard v. Denton*, 72 Ala. 541; *Sutton v. Fox*, 55 Wis. 531; s. c. 42 Am. Rep. 744.

In most if not all the cases cited above the challenge was also allowed for cause not enumerated by the statute; and there are other cases where challenge is allowed for cause not enumerated.—*Carr's Case*, 104 Ala. 4; *Ib.* 104 Ala. 43; *Wickard's Case*, 109 Ala. 45.

The court did not err in admitting in evidence the declarations of co-conspirators at the time the deceased was caught and before he was hung. The record shows that at the time the evidence was admitted there was evidence that a conspiracy existed and that the defendant was one of the conspirators and as the declarations were in furtherance of the common purpose the evidence was admissible for that reason.—*Alston's Case*, 109 Ala. 51; *Bridge's Case*, 110 Ala. 15; *Hunter's Case*, 112 Ala. 77; *Johnson's Case*, 87 Ala. 39; *Wood's Case*, 128 Ala. 271; 29 So. Rep. 557.

Charges requested by the defendant were properly refused.—*Yarbrough v. State*, 115 Ala. 92; *Webb v. State*, 106 Ala. 53; *Barnes v. State*, 111 Ala. 56; *Bones v. State*, 117 Ala. 138; *Griffith's Case*, 90 Ala. 583; *Lowe's Case*, 88 Ala. 8.

DOWDELL, J.—The defendant and one Tom Murphy were jointly indicted at a special term of the circuit court of Elmore county for the murder of Robert White *alias* Robin White, by hanging him by the neck with a rope. The defendant Murphy was not arrested, and on motion of the solicitor a severance was ordered by the court, and the defendant Thomas was tried alone. The bill of exceptions recites as follows: "Thereupon, it was, before the examination of any of the jurors on their *voir dire*, conceded by the defendant that the following named persons, to-wit, Lem Strength, John Strength, Will Still, Martin Fuller, Dave Parker, Jim Pugh, Ben Martin, Jr., Tom Duncan, and Tom Dorrough were indicted at this special term of the court for the murder of Robert White *alias* Robin White at the same time and place that the defendant Thomas is indicted for, and that said parties are not indicted in the same indictment with defendant, but under differ-

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ent indictments, and that said indictments are pending in the court, and that Ben Martin, Jr., and Will Still are in custody awaiting trial at this time of this term on said indictments against them." In selecting the jury for the trial, the name of W. F. Adkins was drawn as a juror, and upon examination on his *voir dire*, it was shown that he was a second cousin to the wife of Ben Martin, Jr., who was then in custody, awaiting trial under an indictment for the same offense. Against the objection of the defendant, the court allowed the State to challenge said juror for cause, to which ruling the defendant excepted. Likewise the name of W. Britt was drawn as a juror, who, on examination on his *voir dire*, was shown to be a second cousin to Will Still, who was then in custody awaiting trial under indictment on the same charge. Against the objection of the defendant, the court allowed the State to challenge this juror for cause, and to which ruling the defendant excepted. It is contended by counsel for the appellant that the relationship here is not named in the statute, (Code, 1896, § 5016), as a ground of challenge for cause. It is not questioned but that the degree of the kinship is within that specified in subdivision 4 of section 5016, but it is urged that the relationship of the juror is not with any one of the persons named in the statute, and, therefore, can not be a ground of challenge for cause; the insistence being, that as the statute specifies certain persons whose relationship to the juror disqualifies, and furnishes ground for challenge, that it must be construed as forbidding as ground of challenge for cause the relationship of the juror to any other person. If the statute calls for such a construction, then it would follow, that in the case of a joint indictment against two or more for the same offense, where a severance is demanded, which is a matter of right (Code, § 5275), the defendant on trial alone, might have the father or brother of the other person jointly indicted with him and awaiting trial, to sit as a juror in his case. It requires no argument to demonstrate that such a juror, in the very nature of things, would not be exempt from influences, that would render him incompetent to act

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as a fair and impartial judge. Again, if the construction asked for, be the proper one, the logic of the reasoning would confine the grounds of challenge of the juror for cause, to those mentioned in the statute, since the reasoning proceeds upon the idea that the specifying of certain things in the statute, is the exclusion of everything not mentioned; or as it is put in argument, the mention of particular persons, is to the exclusion of persons not mentioned. The decisions of this court are opposed to the views urged in argument by counsel for appellant. In *State v. Marshall*, 8 Ala. 302, it was decided, that the enumeration in the statute of causes for challenge was not in exclusion of all others. The purpose of the statute is to secure a fair trial between the State and the defendant by an honest, impartial and intelligent jury. It was never contemplated by the lawmakers, that the enumeration of causes for challenge should operate to deny to either the State or the defendant the very thing that it was the purpose of the statute to secure—a fair trial by an honest, impartial, and intelligent jury. The principle laid down in *Marshall's case, supra*, has since been reasserted and adhered to in the following cases: *Smith v. State*, 55 Ala. 1; *Brazleton v. State*, 66 Ala. 96; *Griffin v. State*, 90 Ala. 596; *Carr v. State*, 104 Ala. 4; *Id.* 104 Ala. 43; *Wickard v. State*, 109 Ala. 45. In *Brazleton's case, supra*, it was said: "Impartiality, freedom from bias or prejudice, capacity without fear, favor or affection, a true deliverance to make between the accused and the State, the law demands as a qualification of a juror; and it is as essential as the impartiality of a judge. Relationship within certain degrees, whether of consanguinity or affinity, is an absolute disqualification. It is not only such relationship, but temporary relations formed in the course of business, or in the intercourse of life, which may disqualify, whenever they may import a just belief of a want of impartiality—that a juror cannot stand indifferent, either from interest, or from the favor springing out of the relation." In that case the juror was bail for the defendant, and it was held to be good ground of challenge for cause. Our conclusion

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is, that the trial court in the case before us, properly allowed the State to challenge the jurors for cause.

Charge No. 19 is involved and far from being clear. It was calculated to confuse and mislead the jury, and for that reason the court committed no error in refusing it.

Charge 16 requested by the defendant is incomplete. Where a word or words are omitted from a charge, which render it incomplete, it is not incumbent on the court to supply such omission in order to give it sense and meaning. The statute requires charges when requested in writing, to be given or refused as asked.

Charge 18, assuming the proof of suspicious facts, and at the same time ignoring the other evidence in the case, was misleading in its tendency, and for this reason, if no other was bad and, therefore, properly refused.

There were exceptions reserved to other charges given and refused, but no comment is necessary, as it is conceded in argument by counsel for appellant, that there is no merit in these exceptions.

After evidence introduced from which the jury might reasonably infer the existence of a conspiracy, the declarations and conduct of a conspirator in furtherance of the common purpose are admissible in evidence against a co-conspirator.—*Hunter v. State*, 112 Ala. 77; *Johnson v. State*, 87 Ala. 39; *McAnally v. State*, 74 Ala. 9.

There is no merit in the exceptions reserved to the rulings of the court on the evidence.

We find no error in the record, and judgment must be affirmed.

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Indictment for Larceny.

1. *Indictment; sufficient averments of ownership of property.*—In an indictment for larceny from a storehouse, where the storehouse and the property alleged to have been stolen there-

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from belonged to a partnership, the ownership of said storehouse and the property is sufficiently laid in one of the members of the partnership.

2. *Larceny; presumption arising from possession of recently stolen property.*—The unexplained possession of property recently stolen, does not, as matter of law, raise a presumption of guilt of larceny; nor does unexplained possession of goods belonging to another raise the presumption that a larceny has been committed and that the possessor is guilty thereof.
3. *Larceny; corpus delicti; admissibility of evidence.*—On a trial under an indictment for larceny, until the State has, by positive or circumstantial evidence, shown a *prima facie* larceny of the property described in the indictment—introduced evidence tending to establish the *corpus delicti*—which is a question for the determination of the court, evidence of the possession by the defendant of the goods alleged to have been stolen is inadmissible.
4. *Same; same; same.*—On a trial under an indictment for larceny, if the evidence introduced affords inference of the larceny of the goods alleged to have been stolen, the question of its sufficiency is for the determination of the jury, and it is for the jury to determine whether the *corpus delicti* has been proven; and in such a case evidence of possession by the defendant of goods of the same kind as those charged to have been stolen is competent and admissible.
5. *Larceny; admissibility of evidence.*—On a trial under an indictment for larceny from a storehouse, where the evidence tends to show that a porter who was employed at the store from which the goods were alleged to have been stolen was suspected as the accomplice of the defendant in the commission of the larceny, and there was evidence showing that such porter had access to the basement of the store in which the goods alleged to have been stolen were kept, that this basement opened upon an alley-way and adjoined another store, it is competent for the State to prove that the defendant was a porter in the adjoining store and had in his possession a key to its basement, which also opened on said alley-way; the tendency of such evidence being to show the defendant's opportunity of aiding said porter in committing the larceny or for the purpose of showing that he had an opportunity of receiving the said goods from the porter.
6. *Charge to the jury; reasonable doubt.*—In a criminal case, a charge which instructs the jury that "unless the evidence is such as to exclude to a moral certainty every hypothesis but that of the guilt of the defendant of the offense charged in

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the indictment, you should acquit him," is erroneous and properly refused, in that it omits the word "reasonable" as qualifying "hypothesis."

APPEAL from the Circuit Court of Lauderdale.

Tried before the Hon. E. B. ALMON.

The appellant was indicted, tried and convicted for larceny from a storehouse, and sentenced to the penitentiary for two years.

The indictment under which the defendant was tried and convicted charged larceny from the storehouse alleged to be the property of B. B. Garner, and further charged that the meat and lard stolen from said storehouse were the property of said B. B. Garner.

On the trial of the cause B. B. Garner, as a witness, testified that he was a member of the firm of Garner & Embry, who conducted a wholesale grocery business in the city of Florence; that prior to the arrest of the defendant on a warrant issued by a justice of the peace, they had missed lard and meat from their storehouse in considerable quantities. The witness further testified that the storehouse occupied by Garner & Embry had a basement where some of the goods were stored; that among the employes of the store was one Andrew Thompson, who was employed as a driver of one of the drays, and sometimes acted as a porter; that said Thompson had access to the basement and sometimes went into the basement alone; that he could have opened the rear door or window of the basement, which opened on the alley-way used for delivering goods, and in this way have disposed of the goods which had been stolen; that said Thompson was suspected of using the basement and door or window thereto in stealing the goods, which could be done by handing the goods to some one stationed outside the door into the alley way; that the defendant worked as a porter in the store of Sullivan & Hart Dry Goods Company, which immediately joined the store of Garner & Embry; that the store where the defendant worked had a basement and was situated similarly to the store of Garner & Embry, and that the defendant carried the key to said basement. To the part of this witness' testimony which related to the base-

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ment and the facilities that were supposed to be offered for robbing the store, the defendant objected, and moved to exclude the same from the jury, unless it should be shown that the basement to the Sullivan & Hart dry goods store was in fact used for that purpose. In connection with this witness' testimony there was offered in evidence several pieces of meat and a bucket of lard which were shown to have been taken from the house of the defendant. The witness Garner testified that the meat stolen from the storehouse of Garner & Embry was of the same kind as that exhibited in evidence, and the lard was in buckets similar to the one introduced in evidence; that he could not say positively that the goods introduced in evidence as those taken from the house of the defendant were the identical goods stolen, but that they were of the class of goods which Garner & Embry dealt in and were of the same kind as the goods stolen.

This witness further testified that the store occupied by Garner & Embry did not belong to Garner & Embry; that the stock of goods belonged to said Garner & Embry, and that he was a member of said firm; and that he and said John Embry, the other member of the said firm, owned the goods alleged to have been stolen and owned the stock of goods in said store. The defendant moved the court to exclude the evidence of this witness and quash the indictment upon the ground that there was a variance between the indictment and the proof as to the ownership of the goods alleged to have been stolen, and between the indictment and the proof as to the ownership of the stock from which said goods were alleged to have been stolen. The court overruled the motion, and the defendant duly excepted.

There was other evidence introduced to show that the goods introduced in evidence and which were shown to the witness Garner, were taken from the house of the defendant while his house was being searched under the authority of a search warrant. The officer who took the goods from the defendant's house testified that the defendant claimed to have purchased said goods from

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one Jim Pruett, who conducted a retail grocery store in Florence; that while in the officer's presence the defendant asked Pruitt if he did not get said goods from him and Pruitt testified that he did sell such goods to the defendant.

Upon the examination of Pruitt as a witness, he testified that the goods sold by him to the defendant were not of the same character as those introduced in evidence.

The defendant introduced several witnesses who testified to his good character in the community where he lived for honesty. The defendant moved the court to exclude from the jury all the evidence introduced by the State having reference to his possession of the goods, or to any explanation of the possession of the goods by the defendant, upon the ground that no competent evidence had been introduced to show that the goods which the defendant was charged with having stolen were in fact stolen, or that they had been recently stolen, and that, therefore, until there was proof of the *corpus delicti*, no explanation could be required of the defendant as to his possession. The court overruled this motion, and the defendant duly excepted.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "If the jury believe the evidence, they must find the defendant not guilty." (2.) "Unless the evidence is such as to exclude to a moral certainty every hypothesis but that of the guilt of the defendant of the offense charged in the indictment, you should acquit him."

There was an application for a new trial, which was overruled, to which ruling the defendant duly excepted.

PAUL HODGES, for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

TYSON, J.—The ownership of the property is sufficiently laid in Garner, one of the members of the partnership.—Code, § 4909; *White v. The State*, 72 Ala. 195; *Brown v. The State*, 79 Ala. 51.

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It must now be regarded as settled in this State that the unexplained possession of property recently stolen does not as matter of law raise a presumption of guilt from the circumstance. Nor does the unexplained possession by one person of goods belonging to another raise the presumption that a larceny has been committed and that the possessor is a thief. Additional evidence is necessary to establish a *corpus delicti*. Unless the jury are satisfied beyond a reasonable doubt, that the offense has been committed, the unexplained recent possession of goods will not justify the conclusion that the person in whose possession they are found is the thief.—*Orr v. The State*, 107 Ala. 35; *Thomas v. The State*, 109 Ala. 25. "Proof of a charge, in criminal causes, involves the proof of two distinct propositions: first, that the act itself was done; and, secondly, that it was done by the person charged and by none other—in other words, proof of the *corpus delicti* and of the identity of the prisoner."—*Winslow v. The State*, 76 Ala. 47. It is undoubtedly true that both of these essential propositions are generally for the determination of the jury and both must be proved beyond a reasonable doubt. But where there is no proof of the *corpus delicti*—no testimony tending in the remotest degree to prove that the property charged to have been stolen, was in fact stolen—no larceny shown to have been committed, then there can be no conviction of the prisoner, should the goods described in the indictment charged to have been stolen be found in his possession, though no explanation as to how he came by them be given by him, or if given, is entirely unsatisfactory. In such case, the evidence is not *prima facie* sufficient to establish the *corpus delicti* and the court should not allow the introduction of evidence of possession by the prisoner of the goods charged in the indictment to have been stolen. In other words, until the State has by positive or circumstantial evidence shown a *prima facie* larceny of the goods, which is for the determination of the court, solely for the purpose of determining the admissibility of evidence tending to connect the prisoner with the commission of the offense, the prosecution is not entitled to introduce evidence of

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possession by defendant of the goods alleged to have been stolen. In this respect, the case would not be different from the one where an extra-judicial confession is sought to be introduced against one charged with a felony. Or where there is an entire want of evidence of the *corpus delicti* except statements made by the prisoner or unexplained possession of the goods alleged to have been stolen, the court should direct the jury to acquit the prisoner. On the other hand, if the evidence affords an inference of the larceny of the goods, then the question of its sufficiency is one for the jury and it becomes their province to determine whether the *corpus delicti* has been proven. In such case, evidence of possession by the prisoner of goods of the same kind as those charged to have been stolen is competent and the jury must determine upon the entire evidence, not only the question of the doing of the act, but whether committed by the defendant. Indeed the *corpus delicti* must often be proved by circumstances. In the case at hand, the owners of the goods charged to have been stolen were wholesale merchants. Garner, one of the partners, swears that meat and lard had been stolen from their store house. It is true he could not state definitely when these articles of merchandise were taken, and neither could he identify the meat and lard found in the possession of the defendant as his firm's property, nor could he say that particular lard and meat had been stolen from his store house. But he was positive that meat and lard had been stolen prior to the institution of the prosecution against this defendant. On this evidence we are of the opinion that there was some proof tending to establish the *corpus delicti*, the weight and sufficiency of which was properly left to the jury. Furthermore, we hold that it was sufficient to authorize the admission by the court of evidence of the possession by the defendant of meat and lard of the same kind as that which Garner said was stolen, and that the evidence of its identity was sufficient to be submitted to the jury when taken in connection with all the other evidence in the case.—Note 6 on page 258 of 78 Am. Dec.

It follows from what we have said that the defendant was not entitled to have given the general affirmative charge requested by him.

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The other written charge requested was correctly refused.—*Bones v. The State*, 117 Ala. 138.

In view of Thompson's access to the basement of the store in which the goods alleged to have been stolen were kept and the fact that the windows and doors to this basement room were unbroken, it was entirely competent for the State to prove that the defendant was a porter in the store of the Sullivan & Hart Dry Goods Co., and that he had in his possession a key to the basement room under that store which opened upon the same alley upon which the basement of the other store opened. Clearly this testimony was relevant for the purpose of showing the defendant's opportunity of aiding Thompson in committing the larceny, or for the purpose of showing that he had the opportunity of receiving the goods from Thompson through an opened door or window and concealing them in the basement to which he had a key until he could remove them.

The overruling of the motion for a new trial is not revisable.

There is no error in the record, and the judgment of conviction must be affirmed.

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Indictment for Murder.

1. *Bill of exceptions; when not considered on appeal.*—When the time for signing a bill of exceptions reserved in the trial of a case in the criminal court of Jefferson county, is not extended by order of the court or written agreement of counsel to be shown by the record, and the bill of exceptions is signed after the expiration of the time fixed by statute for signing bills in said court, such bill of exceptions will not be considered on appeal.
2. *Same; same.*—When a bill of exceptions reserved in the trial of a case is not signed within the time fixed by statute, nor is the time for signing it extended by order of the court or agreement of counsel, shown upon the record, an agreement

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between counsel made after the expiration of the time prescribed for signing bills of exceptions in said court, that said bill of exceptions should be then signed, is not effective to restore the authority for signing and is insufficient to give validity to a bill of exceptions signed at such time, so as to authorize its being considered on appeal.

APPEAL from the Criminal Court of Jefferson.

Tried before the Hon. SAMUEL E. GREENE.

The appellant was indicted, tried and convicted for the murder of Joe Scott and sentenced to be hung.

Under the opinion on the present appeal it is unnecessary to set out any of the facts of the case.

The following agreement, signed by the solicitor and the defendant's attorney, were incorporated in the bill of exceptions, and was dated July 20, 1901: "Whereas, the defendant in the above stated cause was convicted of murder in the first degree in said court on the 22d day of January, 1901; and whereas, within sixty days after said conviction, to-wit, on the 24th day of February, 1901, defendant tendered his bill of exceptions to the presiding judge, Honorable Samuel E. Greene; and, whereas, by reason of severe and protracted sickness in his family the presiding judge was unable to examine and sign said bill of exceptions; therefore, the examination and signing of said bill of exceptions has been duly postponed from time to time by the consent of the solicitor and counsel for the defendant, and it is now agreed between them that said bill of exceptions may be now signed." The bill of exceptions was signed July 20, 1901.

FRED S. FERGUSON, S. W. JOHN and BOWMAN, HARSH & BEDDOW, for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

SHARPE, J.—The verdict in this case was rendered January 22, 1901, and that which is set out in the record as a bill of exceptions was signed on July 20th, 1901. The time for signing bills of exceptions in the criminal court of Jefferson county is limited to sixty

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days from the trial, when not extended by order of court or written agreement as authorized by the Code. This transcript does not show there was any order of court making such extension or that there was any written agreement on the subject except an agreement to the signing between the solicitor and counsel for defendant dated on the day the bill was signed. On the direct authority of *Tisdale v. Ala. & Ga. Lumber Co.*, 131 Ala. 456, it must be held that this agreement not having been made until after the legally authorized time for signing had elapsed was not effective to restore opportunity or authority for signing.

Under the law as declared by many decisions of this court the signature of the judge does authenticate a bill of exceptions so as to authorize its consideration by this court, unless the record shows affirmatively that the signing was done in respect of time, in conformity with the statutes on that subject.—*Dantzler v. Swift Creek Mill Co.*, 128 Ala. 410; *Ala. Min. R. R. Co. v. Marcus*, *Ib.* 355; *Sterrett v. Davie*, 129 Ala. 269, and cases therein cited.

Such affirmative showing is not supplied by the recitation contained in the written agreement of counsel which, after setting forth reasons for the postponement recites, further that "therefore the examination and signing of said bill of exceptions has been duly postponed from time to time by the consent of the solicitor and counsel for defendant." This court must be enabled to judge from what was done rather than from the opinion of counsel or of the trial judge whether the time for signing was legally postponed, and, therefore, if an order of court is relied on as effecting a postponement it should be set out in the transcript (*Dantzler's case*, *supra*), and for like necessity, written agreements intended to continue authority for signing should be exhibited in the record.

For the reason stated that which is incorporated in the record as a bill of exceptions cannot be considered as such.

The record proper disclosing no error, the judgment must be affirmed.

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TYSON, J., *dissents* from the conclusion that the written agreement did not authorize the signing of the bill of exceptions, adhering to his views expressed in *Tisdale v. Ala. & Ga. Lumber Co.*, 131 Ala. 456.

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Indictment for Murder.

1. *Homicide; admissibility of evidence.*—On a trial under an indictment for murder, where it is shown that the defendant and the deceased were both white men, and the evidence on the part of the State tended to show that the deceased was killed by a gun shot which was recklessly fired by the defendant into a crowd of negroes, and one of the witnesses for the State testified on cross-examination that the killing occurred on Saturday night at a negro party, the testimony of such witness on his rebuttal examination by the State, after having been cross-examined by the defendant, "That there was a negro gathering there [the place of the killing] that night," is relevant, material and admissible.
2. *Reasonable doubt; charge to the jury.*—In a criminal case, a charge which instructs the jury that if they "believe the defendant is guilty from the evidence to a moral certainty," they must convict the defendant, is free from error, and is properly given at the request of the State.
3. *Homicide; charge to the jury.*—On a trial under an indictment for murder, where there was evidence tending to show that the defendant recklessly fired a gun into a crowd of negroes, which resulted in the killing of the deceased who was standing near the negroes, a charge which instructs the jury that "Unless the jury are satisfied from the evidence beyond a reasonable doubt that the defendant fired the gun with the intention to kill a human being, they can not find the defendant guilty of murder in the second degree," is erroneous and properly refused.

APPEAL from the Circuit Court of Chilton.

Tried before the Hon. N. D. DENSON.

The appellant in this case, William Bailey, was indicted and tried for murder in the second degree for the

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killing of Joe Patton by shooting him with a gun, was convicted of murder in the second degree and sentenced to the penitentiary for twelve years. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

At the request of the solicitor the court gave to the jury the following written charge: "I charge you, gentlemen of the jury, if you believe the defendant is guilty from the evidence to a moral certainty you must convict the defendant." The defendant duly excepted to the giving of this charge, and also separately excepted to the court's refusal to give, among others, the following written charge requested by him: (2.) "That unless the jury are satisfied from the evidence beyond a reasonable doubt that the defendant fired the gun with intention to kill a human being, they cannot find the defendant guilty of murder in the second degree."

W. A. COLLIER and H. R. HARSH, for appellant, cited 1 Mayfield's Digest, 170; *Crawford v. State*, 112 Ala. 1; *Bob v. State*, 20 Ala. 20; *Tidwell v. State*, 70 Ala. 33; *Brown v. State*, 118 Ala. 111; *Smith v. State*, 92 Ala. 30; *Miller v. State*, 110 Ala. 87; *Munkers v. State*, 87 Ala. 94.

CHAS. G. BROWN, Attorney-General, for the State, cited *Jones v. State*, 100 Ala. 88; *Nutt v. State*, 63 Ala. 184.

DOWDELL, J.—Sam Glass, a witness for the State, testified on his direct examination, that the killing of the deceased occurred on a Saturday night at a negro party or dance. This witness, after being cross-examined by the defense, upon further examination in rebuttal by the State, was permitted to testify, against the objection of the defendant, "that there was a negro gathering there that night." It was competent to show in evidence all the facts and circumstances attending the killing. The facts, which the evidence on the part of the State tended to establish, rendered this evidence not only relevant but very material. The defendant and

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deceased were both white men and friends, and the defense set up, was that the shooting was accidental. The evidence on the part of the State tended to show a reckless firing of the gun by the defendant into a crowd of negroes, which resulted in killing the deceased, who was standing near the negroes. The evidence also tended to show that the defendant had had a difficulty that night with one of the negroes, and at the time he fired the gun said "there would be a negro less here to-night." The court committed no error in the admission of the evidence.

In *Jones v. State*, 100 Ala. 88, it was said that the expressions "to a moral certainty," and "beyond a reasonable doubt" are legal equivalents. A written charge to the jury in a criminal case which predicates a conviction of the defendant, upon a belief to a moral certainty of his guilt, from the evidence, is the equivalent of one which predicates a conviction upon their belief beyond a reasonable doubt of defendant's guilt from the evidence. There was no error in the giving of the charge requested by the State.

Charge No. 2 requested by the defendant was properly refused. There was evidence tending to show reckless firing of the gun into a crowd of negroes—the perpetration of an act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, which under our statutes constitutes murder in the first degree, although there was no preconceived purpose to deprive any particular person of life. It was not necessary to constitute murder in the second degree, for which the defendant was on trial, that he should have the specific intention to kill, at the time he fired the gun.—*Nutt v. State*, 63 Ala. 184.

We find no error in the record, and the judgment is affirmed.

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141 72*Indictment for Adultery.*

1. *Adultery; admissibility of evidence; competency of husband of woman as witness.*—On the trial of a man under an indictment for adultery, the husband of the woman with whom the defendant was charged with having lived in a state of adultery, and who was separately indicted for the same offense, is a competent witness to prove the unlawful cohabitation between his wife and the defendant.
2. *Same; admissibility of evidence.*—On a trial of a man under an indictment for adultery, where the husband of the woman with whom the defendant is charged with having lived in a state of adultery testifies to facts showing the commission by the defendant of the offense charged, and further testified to privileged communications between himself and his wife tending to show a state of enmity or alienation on the part of the wife, brought about by the defendant's presence in his house, it is competent for the husband of the woman to further testify that during such conversation between himself and his wife the defendant, who was in an adjoining room, and who overheard such conversation, laughed out loud thereat.

APPEAL from the City Court of Montgomery.

Tried before the Hon. WILLIAM H. THOMAS.

The appellant in this case, Joe Campbell, was indicted, tried and convicted for living in a state of adultery or fornication with Mary Calvin. In addition to the facts set out in the opinion, Island Calvin, the husband of the woman, Mary Calvin, testified that he permitted the defendant to live in his house with him and his wife, and that he had seen illicit relations between the defendant and his wife; that the defendant slept in an adjoining room to his with a thin partition between them; that one night, after the defendant had lived in his house for about two weeks, and after the witness and his wife had retired and while the defendant was lying in his bed in the adjoining room, upon

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the witness's wife declining to let him touch her or have anything to do with her, the defendant laughed out loud. The defendant moved the court to exclude this testimony, upon the ground that it was immaterial and had no relevancy to the issues involved in the case.

There were several charges requested by the defendant, to the refusal to give each of which the defendant separately excepted; but under the opinion it is unnecessary to set out these charges at length.

ROBERT G. ARRINGTON, for appellant, cited 1 Greenleaf on Evidence, (16th ed.), p. 495, §§ 334, 335; p. 501, § 343, note 2 and citations; *Commonwealth v. Gordon*, 2 Brew. (Pa.), 569; *Cotton v. State*, 61 Ala. 12; *State v. Wilson*, 31 N. J. L.; *State v. Welsh*, 26 Maine, 30; 45 Am. Dec. 94; *Howard v. State*, 94 Ga. 587; *State v. Bridgman*, 49 Vermont, 206; *R. v. All Saints*, 6 M. & S. 194; *People v. Fowler*, 104 Mich. 449; *Hausellman v. Dovel*, 102 Mich. 505; *People v. Gordon*, 100 Mich. 518; *State v. Jolly*, 3 Dev. & B. (N. C.), 110; also see *State v. Phelps*, 2 Tyler (Va.), 374; *Rea v. Tucker*, 51 Ill. 110.

CHAS. G. BROWN, Attorney-General, for the State, cited *Woods v. State*, 76 Ala. 38, and authorities; 29 Amer. & Eng. Ency. Law, 630, § 3, note 4.

MCCLELLAN, C. J.—Joe Campbell, a white man, was indicted, tried and convicted for living in a state of adultery or fornication with Mary Calvin, a negro. The said Mary was separately indicted for living in a state of adultery with him, she being a married woman. On the trial of Campbell, the State was allowed against his objection to introduce and examine as a witness Island Calvin, the husband of the said Mary, to prove its charge against him; and defendant's exception to this action of the court is relied on here to work a reversal of the judgment. The witness' wife, Mary Calvin, though also indicted for living in adultery with this defendant, was not, as we have seen, indicted jointly with him, but separately, and she, of course,

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was not on trial with him. Testimony of the husband going to prove the unlawful cohabitation between his wife and the defendant against the latter on this trial, could not, therefore, in any wise tend to prove the guilt of the wife under the indictment against her. Nor would the conviction of this defendant be *res adjudicata* or any evidence of the wife's guilt.—*State v. Cutshall*, (N. C.), 26 Am. St. Rep. 599. It is settled in this State that in such case the husband may testify on the trial of the party separately tried for an offense alleged to have been committed jointly by him and the wife.—*Woods v. State*, 76 Ala. 35. See also *Birge v. State*, 78 Ala. 435.

A part of the testimony of this witness involved the disclosure of *privileged communications* between him and his wife, Mary Calvin; but it was not objected to on that ground, but expressly upon other grounds which were wholly untenable.

The testimony of this witness as to the defendant laughing aloud anent the conversation between the witness and his wife, cannot we think be said to have been immaterial under all the circumstances detailed by the witness.

The charges refused to defendant were severally patently bad; and we will not discuss them as appellant's counsel does not insist upon them in his brief.

Affirmed.

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Indictment for an Assault with Intent to Murder.

1. *Witness; can not be impeached on immaterial matter.*—If a witness on cross-examination is interrogated as to matter wholly immaterial to any issue in the case, the party calling for such evidence is concluded by the answer of the witness, and can not impeach the witness by contradicting such answer.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. JAMES A. BILBRO.

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The facts of the case are sufficiently stated in the opinion.

No counsel marked as appearing for appellant.

CHARLES G. BROWN, Attorney-General, for the State, cited 10 Ency. Pl. & Pr. 294-296; *Hester v. State*, 103 Ala. 88; 1 Greenleaf on Evidence, § 462; *Gilyard's Case*, 98 Ala. 59; *Smith v. State*, 92 Ala. 69.

HARALSON, J.—The defendant, Ed. Carter, was indicted for an assault on James Galloway, with intent to murder him. On the trial, he was found guilty of an assault, and fined \$50.

James Galloway, the party assaulted, testified that the defendant cut him with a knife, and to facts tending to show that the assault was felonious. Other evidence was introduced by the State, corroborative of this witness' evidence, and tending to establish the guilt of the accused.

The defendant introduced one George Cabaniss as a witness, whose evidence tended to show, that the defendant was not present at the time the State's witness, Galloway, testified that the defendant cut him, and that he was not guilty of the alleged assault.

On the cross-examination of this witness, after testifying that "he was pretty full that afternoon," the solicitor for the State asked him: "Did you not tell Reuben Brown, about two weeks after the difficulty, on the roadside, near Thomas' saw mill, that Ed Carter (the defendant) told you he cut Jim Galloway, and showed you the knife with which he did it?" The witness answered "No."

After the defendant closed his evidence, the solicitor in rebuttal, called Reuben Brown as a witness, and asked him to "state whether or not George Cabaniss on the roadside, near Thomas' mill, two or three weeks after the difficulty, told him that Ed Carter, the next morning after the difficulty, told him (Cabaniss) that he, Ed Carter, cut Jim Galloway, and showed him a knife, saying 'here is the knife that did the work?'" De-

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defendant objected to this question on the ground that it called for illegal, irrelevant and hearsay evidence. The court overruled the objection, "and instructed the jury that the evidence would be received, not as evidence of the fact of the cutting, but as going only to the credibility of the testimony of the witness, Cabaniss, if the jury should believe he made such statements"; and to this ruling, the only one presented for review, the defendant excepted.

The attempt to impeach the credibility of the witness, Cabaniss, in the manner proposed on his cross-examination by the State, was as to matter wholly immaterial to the issue in the case, and purely hearsay as against the defendant, and was improperly allowed. If the witness had been asked, if defendant had not made such a statement to him, such an inquiry would have been relevant and material, and, if he had denied it, the witness, Brown, might have been called to contradict him, by showing that he had made such a statement to him at the time and place laid in the predicate. In such case, the impeachment would have been based on a matter relevant and material, and not on one which was immaterial. The rule is well settled, that if a witness on his cross-examination is interrogated as to a matter wholly immaterial to the issue, the party calling for the evidence is concluded by the answer, and cannot impeach the witness by contradicting it.—*Ortiz v. Jewett*, 23 Ala. 662; *Scale v. Chambliss*, 35 Ala. 20; *Beall v. Folmar*, 122 Ala. 420.

Reversed and remanded.

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Indictment for Obtaining Goods under False Pretenses.

1. *Obtaining goods under false pretenses; sufficiency of indictment.*—An indictment for obtaining goods under false pretenses, which charges that the defendant did make false pre-

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tenses to "Herbert Evans with intent to defraud," setting out such pretenses, and that by means of such false pretenses, "obtained from the firm of Evans Brothers, a partnership composed of A. C. Evans, Chas. B. Evans and Herbert H. Evans," certain specified goods and merchandise, is not subject to demurrer upon the ground that it failed to show that Herbert Evans was either a member of the partnership, a clerk, servant, employee or agent of the firm of Evans Brothers; it not appearing from the face of the indictment that there were two persons bearing the name of Herbert Evans and the identity of the name being presumptive of the identity of the person.

2. *Same; every pretense must not be false.*—On a trial under an indictment for obtaining goods under false pretenses, it is not necessary to a conviction that every pretense charged in the indictment should be proved; but it is sufficient to authorize a conviction if a material part of the false pretenses charged be shown, and it be further shown that it was made with the intent to defraud and that it induced the person sought to be wronged to part with his property.

APPEAL from the County Court of Hale.

Tried before the Hon. W. C. CHRISTIAN.

The appellant in this case, Charley Woods, was tried and convicted under the following indictment: "The grand jury of said county charge that Charley Wood alias Charley Woods did falsely pretend to Herbert Evans, with intent to defraud, that he had unincumbered one cream colored horse Sid, and one single no top buggy, and by means of such false pretenses, obtained from the firm of Evans Brothers, a partnership composed of A. C. Evans, Charlie D. Evans, and Herbert H. Evans, two pairs of pants, of the value of three and 50-100 dollars; and three coats of the value of six and 25-100 dollars; six pairs of shoes of the value of eight and 25-100 dollars; and ten pounds of meat, of the value of one dollar, against the peace and dignity of the State of Alabama." To this indictment the defendant demurred upon the following grounds: 1. It fails to show that the alleged false pretenses were made to the firm alleged to have been defrauded or any agent or employee or member of said firm. 2. That said indictment fails to show that Herbert Evans was a member of the firm of Evans Brothers, or an agent or em-

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ploye of said firm, or was in any connected with said firm. This demurrer was overruled.

On the trial of the cause there was evidence introduced on the part of the State tending to show that the defendant made the representations as charged in the indictment, and upon the strength of such representations obtained from Evans Brothers the goods and merchandise as alleged in the indictment. That the representations were made to Herbert Evans, who was a member at the time, of the partnership of Evans Bros. mentioned in said indictment, and that he was the same person who was described in the indictment as a member of said firm of the name of H. H. Evans. The testimony for the State further tended to show that at the time of making said representations the defendant had given a mortgage upon the horse owned by him, and said mortgage was a valid and outstanding lien against said horse, and that the defendant owned only the one horse referred to in the indictment and included in the mortgage. It was further shown that the defendant owned a buggy at the time of making the representations and there was no proof introduced upon the trial to show that the buggy was, at the time of the representations, incumbered by any lien, but as a matter of fact, the buggy was wholly unincumbered. Thereupon the defendant moved to be discharged upon the ground that there was a material variance between the allegations and the proof. The court overruled this motion and the defendant duly excepted.

The cause was tried by the court without the intervention of a jury, and upon the hearing of all the evidence, the court rendered judgment of conviction, from which judgment the defendant appeals.

DEGRAFFENRIED & EVINS, for appellant.—The indictment must show on its face a connection between the alleged pretense and the accomplished fraud.—*Mack v. State*, 63 Ala. 140; *Opeland v. State*, 97 Ala. 30; Bish. Stat. Crimes, § 452.

There was a material variance and the motion to discharge should have been granted.—*O'Connor v. State*, 30 Ala. 1.

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CHAS. G. BROWN, Attorney-General, for the State, cited *Garrett v. State*, 76 Ala. 18; *Beasley v. State*, 59 Ala. 20; *Headley v. State*, 106 Ala. 109.

TYSON, J.—The demurrer to the indictment questions its sufficiency with respect to the relation of Herbert Evans, to whom the false pretense was alleged to have been made, to the partnership from whom the goods were fraudulently obtained. It is insisted that the averments fail to show that Evans was either a member of the partnership, a clerk, servant, employee or agent of the firm of Evans Brothers. This insistence has for its foundation the fact that Evans to whom the false representation was alleged to have been made, is designated as Herbert Evans, while the partnership averred to have been defrauded, is alleged to have been composed to A. C. Evans, Charles D. Evans and Herbert H. Evans. The argument is, that by the use of the letter "H." two distinct and separate persons bearing the name of Herbert Evans are shown; and therefore, the false representation having been made to one Herbert Evans, who is in nowise shown to have been connected with the firm that was defrauded, the indictment is bad. It may be that this contention would be sound, if it could be affirmed that there appears upon the face of the indictment two persons bearing the name of Herbert Evans. But, since the law does not regard a middle name and as identity of name is presumptive of identity of person, it must be held upon demurrer that they are the same person.—*Garrett v. The State*, 76 Ala. 18. In describing third persons in an indictment, certainty to a common intent is all that is required.—*Thompson v. The State*, 48 Ala. 165. The demurrer was not well taken.

In the recent case of *Leath v. The State*, 132 Ala. 26, the defendant was indicted for obtaining money by false pretenses. The false representation alleged was that the indorsements by the payees of certain warrants were genuine. The evidence showed that some of these indorsements were not genuine. The point was made in that case, as here, that there was a fatal variance between the allegations and the proof; and it was in-

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sisted that the State should be required to prove the falsity of the entire representation as charged. We held otherwise. See also *Beasley v. The State*, 59 Ala. 20, where the case of *O'Connor v. The State*, 30 Ala. 9, upon which appellant relies, is distinguished.

Affirmed.

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Indictment for Murder.

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1. *Organization of jury in capital case.*—Under the provisions of the statute regulating the manner of drawing and summoning special juries in capital cases (Code, § 5004), a special venire, composed of not less than twenty-five nor more than fifty names, must be drawn for each capital case; and it is error for the court to draw one special venire for the trial of two defendants, separately indicted for separate and distinct felonies.
2. *Same.*—Under the provisions of the statute, it is the right of a defendant indicted for a capital offense to have a jury selected from all the persons summoned as special jurors, who are in attendance and who are competent (Code, §§ 5004, 5005, 5009); and it is not only error for the court to draw one special venire for the trial of two defendants indicted for separate and distinct felonies, whose trials are set for the same day, but it is also error for the court, after having selected a jury from the special and regular juries, for the trial of one of the defendants, to deny the other defendant the right of passing on said jurors in the organization of the jury for the latter's trial.
3. *Homicides; charge to the jury.*—On a trial under an indictment for murder, a charge is free from error which instructs the jury that "If the jury have a reasonable doubt as to whether the killing was done deliberately, or as to whether it was done premeditatively, then they can not find the defendant guilty of murder in the first degree, and if they have a reasonable doubt as to whether the killing was done in malice, then they can not find the defendant guilty of murder in either degree, but only manslaughter at most; and if after considering all the evidence, the jury have a reasonable doubt as to

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defendant's guilt of manslaughter, arising out of all the evidence, then they should find the defendant not guilty of any offense," and such charge should be given at the request of the defendant.

4. *Same; same; burden of proof.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "The burden of proof is not shifted from the State to the defendant, and the presumption of innocence abides with the defendant, until all the evidence in the cause convinces the jury to a moral certainty that the defendant can not be guiltless." (DOWDELL, J., *dissenting*.)
5. *Charge of court to jury; should be clear and certain.*—Charges which the court are requested to give should be expressed in clear, certain and intelligent language; and if not so expressed are properly refused.
6. *Abstract and argumentative charges* are properly refused.
7. *Homicide; charge to the jury.*—On a trial under an indictment for murder, where there is evidence tending to show that the defendant brought on the difficulty, a charge is erroneous and properly refused which instructs the jury that "If one assaulted suddenly and under the maddening influence of blows slays his assailant, and there is nothing else in the transaction, this is manslaughter and not murder."
8. *Same; same; self-defense.*—On a trial under an indictment for murder, charges which hypothesize self-defense in general terms, or which hypothesize one or more elements of self-defense, and which omit to set out all the constituent elements of self-defense, are erroneous and properly refused.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

The appellant, Warren Adams, was indicted and tried for the murder of Coston Edwards, was convicted of manslaughter in the first degree, and sentenced to the penitentiary for ten years.

The defendant moved the court to quash the venire in this case upon the following grounds: "1. Said venire was not drawn in accordance with the law. 2. This defendant was arraigned on Monday, the 2d day of September, 1901, and at the same time was arraigned one Dan McGuire, also charged with murder in the first degree; that on said September 2d, 1901, the court ordered that the clerk of said court should draw from

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the jury box forty-five names, which, together with the regular panel of jurors for this week of said circuit court should constitute the special venire, both in the case of *The State v. Warren Adams* and the case of *State v. Dan McGuire*, both of whom were under indictment for capital offenses, but, separate and distinct and in no way connected, one with the other, and said venire was drawn contrary to law. 3. Because there was not a venire drawn for this case only, but said venire was drawn for this case and also case of *State v. Dan McGuire*, and it is attempted in this case to make said one venire answer for and constitute the venire for each and both of said two cases, and it is contrary to law. 4. No venire was drawn for this case alone as required by law, but said venire was drawn for the case of this defendant, and also that of *State v. Dan McGuire*, and said venire constitutes the venire for both of said cases, and this defendant moves to quash the same." The motion to quash was overruled, and the defendant duly excepted.

Before the drawing of the jury the defendant objected to being required to select a jury from said venire, and objected to being placed on trial in said cause, upon the following grounds: "1. Said venire in said cause was drawn as follows: The court had on the 2d September, 1901, this defendant and one Dan McGuire, both charged with murder in the first degree, arraigned and when arraigned, each plead not guilty; the court then ordered the clerk of said court to draw from jury box forty-five names, which said forty-five names were drawn to serve for cases of *State v. Warren Adams* and also case *v. Dan McGuire*, said forty-five names, together with the regular panel of jurors for this the second week of said court to constitute the venire for both cases of *State v. Warren Adams* and *State v. Dan McGuire*, and the court then set said two cases for same day, to-wit, Monday, September 9th, 1901, and said 45 names so drawn, together with the regular panel of jurors for this week does constitute the venire for both of said cases. 2. And this defendant further objects to being placed on trial and to said venire, and says

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that twelve of those so constituting the venire in said two cases are now engaged in the trial of the case of *State v. Dan McGuire*, and can not now be called to serve upon his case, and this defendant makes oath that the facts herein stated are true—best of his knowledge and belief.” Each of these objections were overruled, and the defendant separately excepted.

On the trial of the cause, the State introduced evidence tending to show that the defendant was guilty as charged in the indictment. There was evidence introduced in behalf of the defendant tending to show that the homicide was committed in self-defense. The other facts of the case are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked, (the charges are copied in the order in which they appear in the bill of exceptions): (14.) “If the jury have a reasonable doubt as to whether the killing was done deliberately, or as to whether it was done premeditatively, then they can not find the defendant guilty of murder in the first degree, and if they have a reasonable doubt as to whether the killing was done in malice, then they can not find the defendant guilty of murder in either degree, but only of manslaughter at most; and if after considering all the evidence, the jury have a reasonable doubt as to defendant's guilt of manslaughter, arising out of all the evidence, then they should find the defendant not guilty of any offense.” (9.) “In this cause the burden of proof is not shifted from the State to the defendant, and the presumption of innocence abides with the defendant until all the evidence in the cause convinces the jury to a moral certainty that the defendant can not be guiltless.” (13.) “No greater burden rest upon the defendant when tried for a criminal offense, than to create a reasonable doubt in the minds of the jury of his guilt and he is entitled to it under the defense of self defense, or any other ground of defense.” (1.) “I charge you, gentlemen, that when no more appears from the evidence in a case than an unlawful and

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intentional killing of an human being, although without excuse or mitigation, the homicide is such a case to be no more than murder in the second degree." (22.) "If the conduct of the defendant in this case was consistent with his innocence, then he is not guilty of any offense." (6.) "The court charges the jury that though evidence tending to show flight is a matter to be considered by the jury, yet, it is of weak and inconclusive character, it may not be evidence of guilt at all." (8.) "If one assaulted suddenly and under the maddening influence of blows slays his assailant, and there is nothing else in the transaction, this is manslaughter and not murder."

WORTHY & GARDNER, for appellant.—The court erred in overruling the defendant's motion to quash the venire and his objection to being put to trial.—*Mitchell v. State*, 129 Ala. 23; *Evans v. State*, 80 Ala. 4; *Thompson v. State*, 122 Ala. 12; *Childress v. State*, 122 Ala. 21.

The court erred in refusing the several charges requested by defendant.—*Compton v. State*, 110 Ala. 23; *Stoneking v. State*, 118 Ala. 70; *Henson v. State*, 112 Ala. 46; *Brown v. State*, 109 Ala. 89; *Williams v. State*, 98 Ala. 22; *Cohen v. State*, 50 Ala. 108; *Bain v. State*, 74 Ala. 38; *Bodine v. State*, 129 Ala. 106; *Scales v. State*, 96 Ala. 75; *Crawford v. State*, 112 Ala. 33; *Smith v. State*, 68 Ala. 430; *Roberts v. State*, 68 Ala. 156.

CHAS. G. BROWN, Attorney-General, for the State. There is no merit in the motion to quash, or plea in abatement to venire.—*Chamblee v. State*, 78 Ala. 466; *Thomas v. State*, 124 Ala. 48.

DOWDELL, J.—Section 5004 of the Criminal Code under which the special venire in this case was drawn, provides as follows: "When any capital case or cases stand for trial, the court shall, at least one entire day before the same are set for trial, cause the box containing the names of jurors to be brought into the courtroom, and after having the same well shaken, the pre-

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siding judge shall then and there publicly draw therefrom not less than twenty-five nor more than fifty of such names *for each capital case* [italics are ours, and for purposes that will appear hereafter], a list of which shall be immediately made out by the clerk of the court, and an order issued to the sheriff to summon the persons so drawn to appear upon the day set for trial, in like manner and under like penalties as he is required to summon grand and petit jurors. If the names in the jury-box should be exhausted before the completion of the drawing of such special jurors, the court shall direct the sheriff to summon from the qualified citizens of the county, the specified number of persons necessary to complete the number of special jurors ordered by the court."

At the time of setting a day for the trial of the defendant there were two capital cases pending in the circuit court, that of the defendant and one of the State v. Dan McGuire. These defendants were separately indicted and for separate and distinct felonies. Both cases were by order of the court set for trial on the same day, and by order of the court only one drawing of special jurors was had, which together with the regular jurors drawn and summoned for the week of the trial, constituted one and the same special *venire* for the trial of both cases. On the day of the trial a jury of twelve was first selected from the special *venire* for the trial of the defendant Dan McGuire, and thereupon and then the court proceeded to the selection of a jury of twelve for the trial of the appellant, all against this defendant's objection. Before a jury had been completed, the names of all of the persons who had been selected for the first jury, were drawn, and as each was drawn, the slip containing the name, was directed by the court to be laid aside, and the defendant denied the right of passing on said jurors by challenging or accepting.

From the foregoing statement it is apparent that the defendant did not have the number of jurors from which to select a jury for his trial, which the former order of the court, made in setting a day for his trial gave him, and this by the action of the court. It is

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wholly different from, and does not come within the principles and reason of those cases, where one or more of the regular jurors, who constitute in part the special *venire*, may happen at the time of the drawing and selecting of a jury in a capital case, to be engaged in the trial of some other case, as in *Kimbrough v. State*, 62 Ala. 248, and similar cases. As was said in *Evans v. State*, 80 Ala. 6, in such cases, "the ruling is founded on the presumption, that when the legislature provided that the regular jurors in attendance should constitute a part of the *venire*, it was contemplated that some of them might be engaged in the trial of another cause, and that the right of the defendant to have such regular jurors called is subject to the due administration of the law, and does not operate to delay or obstruct the business of the court." The necessities in such cases arise not by any act of the court, but unavoidably in the due administration of the law. But so much cannot be said in the present case. Nor can it be said, that it was within the contemplation of the legislature in the enactment of the statute under which the *venire* in this case was drawn, that any of the special jurors drawn on the *venire* might be engaged in the trial of another cause at the time of the drawing and selecting the jury from the *venire* for the trial of the case. The statute provides, that not less than twenty-five nor more than fifty special jurors, may be drawn for the special *venire*, and if one *venire* may be ordered for the trial of two cases, why not for the trial of three cases, or as for that matter four cases; and if the number of special jurors ordered be thirty-six, it would be possible in making up the first three juries of twelve each, from the special *venire*, to exhaust the thirty-six special jurors drawn, leaving to the fourth defendant, not one of the special jurors drawn for his trial, and only the regular jurors from which to select his jury, thereby utterly defeating the purposes of the statute. The question here presented, that is, of drawing one special *venire* for the trial of two separate capital cases, was considered by this court in the case of *Evans v. State*, *supra*, not under the present statute above set

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out, but under a local statute entitled an act "To regulate the drawing and empanneling of grand or petit jurors in Dallas county," approved February 14, 1885, (Session Acts, 1884-85, p. 492). In construing the part of this act relating to the drawing and selecting of a jury for the trial of a capital felony, it was held to be error to order one *venire* for the trial of two defendants separately indicted for separate and distinct felonies. Without repeating all that was there said, with regard to the manifest operation of the provisions of the statute to preserve unity, etc., in empanneling a jury, and contemplating that it shall be a proceeding in the particular case, individualized and separate from all other criminal cases pending in the court, it may be here observed, that what was said, applies with equal force and reason to section 5004 now under consideration. This section formed a part of the act approved February 26, 1887, which, as originally passed, excepted from its provisions certain counties named therein. In express terms, as originally enacted, and as it now stands in the Code, it provides for a drawing of special jurors "*for each capital case*," that is, when more than one capital case stands for trial. Section 5005, which follows section 5004, directs what shall constitute the *venire* for the trial of a capital case. This section provides, that the special jurors so drawn together with the regular jurors drawn and summoned for such subsequent week, when set for trial other than a day of the first week, shall constitute the *venire*. Section 5009 directs the manner of drawing the jury on the day set for the trial. This section provides that the names of the jurors summoned for the trial as well as the names of the regular jurors in attendance, must be written on slips of paper, folded or rolled up, placed in a box, or some substitute therefor, and shaken up, to be drawn out, one by one, in the presence of the court by some officer designated by the court, until a jury is completed. It is manifest from these provisions that it was intended to secure to the defendant the right to select his jury from the special jurors drawn and summoned for his trial, not from a part of them, but from

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all, and likewise from the regular jurors constituting in part the special *venire*, but in case of the regular jurors, subject, of course, to the contingency of one or more of them being at the time engaged in the trial of some other cause.

The case of *Chamblee v. State*, reported in 78 Ala. 466, was decided at the same term as *Evans v. State*, *supra*, and cites the latter case, differentiating the two cases. The statute under consideration in *Chamblee's case*, was the act approved February 17, 1885 (Session Acts, 1884-85, p. 181). The provisions of this act relative to the drawing of jurors for capital felonies are materially different from the provisions of section 5004 of the Code. Section 10 of this act provided for the drawing of one special *venire* from which to select *juries* for capital cases standing for trial.

The statute under consideration in the case of *Thomas v. State*, 124 Ala. 48, was a local statute, applying to Montgomery county. This act in express terms authorized the drawing of one *venire* for the trial of two or more capital cases.

Our conclusion is that the circuit court committed error in ordering one special *venire* for the trial of two separate and distinct cases.

The defendant requested in writing many charges, quite a number of which were refused by the court. Some of the refused charges contained correct expositions of the law, and others did not. According to the order in which they appear in the record, the first refused charge which should have been given is numbered 14. This charge was held good in *Compton v. State*, 110 Ala. 34, and in *Stoneking v. State*, 118 Ala. 70. The only difference between the charge here and the charge in those cases being, that in the latter the language used is—if the jury has a reasonable doubt of defendant's guilt of manslaughter “arising out of *any part* of the evidence;” while the language used in the present charge is—“arising out of *all* of the evidence.” The change instead of detracting from the charge tended to make it a more perfect one, and the court erred in its refusal.

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Charge No. 9 refused to the defendant is an exact copy of a charge which was held to correctly state the law, in *Smith v. State*, 68 Ala. 430. I think the charge is a correct statement of the law, and I approve the former ruling in *Smith's case*, *supra*. The majority of the court, at present, however, are of a contrary view and hold that the charge is faulty in that it is misleading in its tendency, and for that reason was properly refused.

If charge No. 13, as copied in the record, is a correct copy of the charge as asked—and we cannot say that it is not—then it can hardly be said to be intelligible. Charge No. 1 is subject to like infirmity. Charge No. 22 is indefinite and uncertain, with tendency to mislead.

The evidence without conflict showed that the defendant after the killing fled from the State, and was apprehended in Arkansas and brought back from that State. This was all of the evidence as to flight—no explanation was offered. Under this state of the evidence, charge 6, whether abstractly good or not, was properly refused.

There was evidence tending to show that the defendant brought on the difficulty, and under this phase of the evidence, charge 8, if bad for no other reason, was properly refused.

Charges hypothesizing self-defense in general terms which omit to set out the constituent elements of self-defense, have been condemned by this court in *Miller v. State*, 107 Ala. 40, and in *Gilmore v. State*, 126 Ala. 20. So also charges hypothesizing one or more elements of self-defense without setting out all of the constituent elements, and asking an acquittal on those hypothesized if believed, should be refused. The refused charges not herein above specially mentioned, are either subject to the infirmities just stated, or are argumentative, or are faulty in misplacing the burden of proof.

It would unnecessarily prolong this opinion to attempt to deal with the refused charges separately. What we have said is sufficient for the purposes of another trial. For the errors pointed out the judgment of the circuit court must be reversed and the cause remanded.

Reversed and remanded.

[Winter v. The State.]

Winter v. The State.*Indictment for selling Spirituous, Vinous or Malt
Liquors Contrary to Law.*

1. *Selling spirituous liquors; charge of court on the effect of the evidence.*—On a trial under an indictment for selling spirituous, vinous or malt liquors without a license and contrary to law, where the court in its charge to the jury, after instructing them as to what constituted a sale, then charges that the State must show beyond all reasonable doubt that the defendant sold the whiskey in question to the party as alleged, or that not being the owner or interested in it or in the money paid for it, he was acting in the sale for the owner of the whiskey, it is error for the court to further instruct the jury that “there was a sale of the liquor in this case appears from the evidence almost without dispute;” this portion of the charge being upon the effect of the evidence.
2. *Same; general charge of court to jury.*—In such a case, where in addition to the instructions contained in the general charge as above set out the court further instructed them that in order to convict the defendant they must believe from the evidence beyond all reasonable doubt that he sold the whiskey to the State’s witness, or that if he did not own the whiskey he aided and assisted in the sale as the agent of the owner, it is not error for the court to further instruct the jury in its general charge that “if you believe from the evidence beyond all reasonable doubt defendant’s conduct was a subterfuge to sell his own whiskey to the witness, then he would be guilty.”
3. *Same; same.*—In such a case, it is not error for the court to instruct the jury in its general charge that “if the defendant had no interest in the whiskey, but if you believe from the evidence beyond all reasonable doubt he was acting as the agent of some one else who owned the whiskey in making a sale to the State’s witness, if such sale was made, he is guilty.”
4. *Same; not error to refuse charges which are repetitions of those already given.*—It is not error for the court to refuse charges requested by defendant which are substantially dupli-

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cates or a repetition of charges previously given at the request of the defendant.

5. *Same; charge to the jury.*—On a trial under an indictment for selling spirituous, vinous or malt liquors without a license and contrary to law, a charge is erroneous and properly refused as misleading, which instructs the jury that "there is no presumption in this case that the defendant was a man who had liquor to sell;" since the defendant may have properly been found guilty as charged in the indictment, notwithstanding he had no liquor to sell.

APPEAL from the Circuit Court of Cherokee.

Tried before the Hon. JAMES A. BILBRO.

The appellant in this case, J. H. Winter, was indicted, tried and convicted for selling spirituous, vinous and malt liquors without a license and contrary to law. Upon the trial of the case, only one witness, Dal Keener, was examined. He testified that he met the defendant in Centre, Cherokee county, and stated to him that he would like to get some whiskey; that the defendant replied that he did not know of any, but said that he might find some; that upon being asked what half a pint would cost, he said he supposed it would cost 35 cents; thereupon the witness threw 35 cents on the ground in the defendant's presence and left; that the defendant also left and in about half an hour he, the witness, saw the defendant and asked him about the whiskey, and the defendant told him where he had left it on the side of the road about a quarter of a mile from where he first saw the defendant. This witness further testified that when the defendant left him he went in the direction of his home, and that the whiskey was placed not very far from the defendant's home.

Among the portions of the court's oral charge to which exceptions were separately reserved and which are referred to in the opinion, were the following: (A.) "If you believe from the evidence beyond all reasonable doubt defendant's conduct was a subterfuge to sell his own whiskey to the witness, then he would be guilty." (B.) "If defendant had no interest in the whiskey, but if you believe from the evidence beyond all reasonable doubt he was acting as the agent of some one else who owned the whiskey in making a sale to the State's

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witness, Keener, if such a sale was made, he is guilty."

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "The court charges the jury that if the jury have a reasonable doubt growing out of the whole evidence or any part of it, whether the defendant sold the liquor to the witness or was interested in the liquor or the money thrown down by the witness, or whether the defendant acted merely as the agent of the witness in procuring the liquor for him, then the jury can not convict him." (2.) "There is no presumption in this case that defendant was a man who had liquor to sell." (3.) "The jury are not authorized to guess at defendant's guilt, but must find him not guilty unless they are convinced by the evidence beyond all reasonable doubt and to a moral certainty that defendant sold the liquor as charged in the indictment."

H. W. CARDEN, for appellant.

CHAS. G. BROWN, Attorney-General, for the State, cited *Amos v. State*, 78 Ala. 498; *Robertson v. State*, 99 Ala. 189; *Robeson v. State*, 100 Ala. 40; *Gilmore v. State*, 125 Ala. 59; *Bonds v. State*, 130 Ala. 117; 1 Mayfield's Digest, 480, § 282.

HARALSON, J.—Only one witness was examined, and that on the part of the State. His evidence tended strongly to show that defendant sold him at the time and place mentioned, a half pint of whiskey, for the price of 35 cents.

In its general charge to the jury, the court stated in a manner not objected to, what constituted a sale, and told them that the State must show beyond all reasonable doubt, that the defendant sold the whiskey in question to the party alleged, or, that not being the owner of nor interested in it, nor interested in the money paid for it, if any was paid, he was acting in the sale for the owner of the whiskey. After this statement, the court stated to the jury: "That there was a

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sale of the liquor in this case appears from the evidence almost without dispute." To this statement, the defendant excepted. This was a charge on the effect of the evidence, an error which was not relieved by other portions of the oral charge in which it appeared,—the question as to whether there was a sale or not, being one for the determination of the jury under all the evidence.

Parts of the oral charge marked A and B, were separately excepted to. These were given in connection with that part of the charge set out above, to which exceptions were reserved, and in the same connection, as a part of the same oral charge,—“That, before they [the jury] could convict the defendant, they must believe from the evidence beyond all reasonable doubt, that the defendant sold the whiskey to the witness, Keener, or that if he did not own the whiskey, he aided and assisted in the sale as the agent of the owner,” etc. When construed with reference to and in connection with the entire charge and the evidence in the case, these excepted portions of the charge did not contain reversible error. The one marked A, thus construed, did not assume that defendant sold his own liquor.

The first charge refused to defendant, was substantially given in charges 1, 2, 3 requested by defendant; but, without reference to this, it was bad, in that it predicated an acquittal on a part of the evidence.—*Nicholson v. State*, 117 Ala. 32; *Winter v. State*, 132 Ala.

Charge 2 was properly refused as tending to mislead the jury. Defendant might have been properly found guilty under the evidence, notwithstanding he was not a man who had liquor to sell.

Without reference to other infirmity in charge 3, refused to defendant, it was a substantial duplicate of charge 6 given, and its refusal may be justified on that ground.

For the error indicated the judgment below is reversed and the cause remanded.

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Prosecution for Carrying Concealed Weapons.

1. *Carrying concealed weapons; sufficiency of complaint.*—A complaint which charges that within twelve months before the making thereof the defendant "carried concealed about his person a pestol," is not bad or subject to demurrer for the mistake in the spelling of the words person and pistol; such mistake being a mere clerical or grammatical error.
2. *Motion in arrest of judgment; how should be shown on appeal.* A motion in arrest of judgment, the ruling thereon, and the reservation of the question as to such ruling can not be presented on appeal by bill of exceptions, but must be shown by the record proper; and when presented only by bill of exceptions, the ruling of the trial court thereon will not be reviewed.
3. *Same; when properly made.*—In a criminal case, a motion in arrest of judgment must be disposed of by being denied or granted after the verdict, and before the court proceeds to pronounce sentence upon the accused; and when not made until after the sentence is pronounced, such motion comes too late.
4. *Criminal law; motion for new trial.*—Rulings upon motions for new trials in criminal cases are not revisable on appeal.
5. *Carrying concealed weapons; when general affirmative charge improperly given.*—Where on a trial of a defendant for carrying a pistol concealed about his person there is no dispute as to the defendant having a pistol on his person, but the evidence is in conflict as to whether such pistol was concealed, the general affirmative charge is improperly given at the request of the State.
6. *Charge to the jury; reasonable doubt.*—In a criminal case, a charge which instructs the jury that "if you do not believe the evidence beyond a reasonable doubt you are not required to find the defendant guilty," is erroneous and properly refused.
7. *Carrying concealed weapons; charge to the jury.*—On a trial under a prosecution for carrying a pistol concealed, a charge is erroneous and properly refused which instructs the jury

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that "if you are satisfied from the evidence that the defendant was carrying the pistol in such a manner that it was observable by ordinary observation, you should find the defendant not guilty."

APPEAL from the County Court of Morgan.

Tried before the Hon. WILLIAM E. SKEGGS.

The complaint under which the appellant, Calvin Hampton, was tried and convicted charged "that within twelve months before the filing of this complaint, Calvin Hampton carried concealed about his person a pistol, which said offense has been committed in said county against the peace and dignity of the State of Alabama."

To this complaint or affidavit the defendant demurred upon the ground that it did not charge the commission of any offense, but avers that the defendant "carried concealed about his person a pistol," and that the averments of said affidavit were uncertain and insufficient. This demurrer was overruled.

Under the opinion on the present appeal it is unnecessary to set out the facts in detail.

The court, at the request of the State, gave to the jury the following charge: "If the jury believe the evidence beyond a reasonable doubt, they will find the defendant guilty as charged in the complaint." The defendant duly excepted to the court's giving this charge, and also separately excepted to the court's refusal to give the following written charges requested by him: (1.) "If you do not believe the evidence beyond a reasonable doubt, you are not required to find the defendant guilty." (2.) "If you are satisfied from the evidence that the defendant was carrying the pistol in such a manner that it was observable by ordinary observation, you should find the defendant not guilty." After the judgment of conviction rendered upon the verdict of the jury, the defendant made a motion in arrest of judgment. This motion does not appear as part of the record, and it does not appear to have been made until after the sentence of the court had been passed upon the defendant.

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RUSSELL & LYNNE, for appellant.—The demurrer to the complaint should have been sustained. The mistake in the spelling of the words therein rendered the same uncertain and defective.—*Parker v. State*, 114 Ala. 690; *Wood v. State*, 50 Ala. 144; *Griffith v. State*, 90 Ala. 583.

The court erred in its ruling upon the charges requested.—*Pierson v. State*, 99 Ala. 151; *A. G. S. R. R. Co. v. McAlpine*, 80 Ala. 76; *Siebold v. Rogers*, 110 Ala. 438; *Jones v. State*, 51 Ala. 17; *Street v. State*, 67 Ala. 89.

CHAS. G. BROWN, Attorney-General, for the State. There was conflicting evidence in the case and charge 1 had tendency to mislead and confuse the jury.—*Koch v. State*, 115 Ala. 99.

The second charge requested by the defendant was properly refused.—*Driggers v. State*, 123 Ala. 49; *Ramsey v. State*, 91 Ala. 29; *Smith v. State*, 96 Ala. 68.

TYSON, J.—The complaint upon which defendant was tried is not before us. The copy of it in the transcript does not show clearly how the word "person" was spelled, whether "peurson" or "purson." But it is of no consequence whether the one or the other, since it is simply a clerical or grammatical error. It is impossible to read the complaint and be in doubt as to the word intended or its import. The same may be said of the word pistol, if we concede that it was written "pestol."—*Grant v. The State*, 55 Ala. 207; *Ward v. The State*, 50 Ala. 120.

A motion in arrest of judgment, the ruling thereon and the reservation of a question as to such ruling can not be presented on appeal by bill of exceptions, but must be shown by the record proper; and when presented only by bill of exceptions the ruling of the trial court thereon will not be reviewed.—*Taylor v. The State*, 112 Ala. 69. Furthermore, such motion should be made and denied after the verdict and before sentence. It comes properly between the verdict and judgment pronouncing the sentence.—*Sanders v. The State*, 129 Ala. 69.

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The overruling of the motion for a new trial is not reversible.—*Bondurant v. The State*, 125 Ala. 31.

There was no dispute as to the defendant's having the pistol on his person. The matter of controversy was as to whether it was concealed. On this point, the evidence was in conflict. It was error, therefore, to give the general affirmative charge, with hypothesis, for the State. If the pistol was not concealed the prisoner was not guilty and the fact of its concealment was a question for the jury.

There was no error committed in the exclusion of evidence, nor in the refusal of the two written charges requested by defendant.—*Koch v. The State*, 115 Ala. 99; *Driggers v. The State*, 123 Ala. 46.

Reversed and remanded.

Walkley v. The State.

Indictment for Assault and Battery.

1. *Trial and its incidents; right of court to adjourn from time to time.*—A court has the inherent power to adjourn its sitting from time to time within the time allowed by law for holding the term; and the exercise of this power operates merely as a postponement of the business, and is not the ending of the term; and, therefore, under the statute regulating the terms of and proceedings in the county court of Elmore county, providing that the regular term "may continue until the business is disposed of," (Local Acts, 1898-99, p. 257), the adjournment of the court upon the day fixed for the holding of the regular term, to some subsequent day, prior to the time of holding the next succeeding term, does not amount to an adjournment *sine die*, but is a temporary adjournment from one day to another day of said regular term.
2. *Pleading and practice; sufficiency of replication to plea of former conviction.*—A replication to the plea of former conviction which does not either expressly or impliedly deny the facts averred in said plea nor present any issue of fact, is subject to demurrer.
3. *Trial and its incidents; reading from law books in argument to jury.*—It is not error for the court to refuse to allow de-

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fendant's counsel in his argument to the jury to read extracts from law books.

4. *Assault and battery; charge to the jury.*—In a prosecution for an assault and battery, where the evidence for the defendant tends to show that the day before the commission of the assault the person assaulted, who was a school teacher, had immoderately whipped the son of the defendant, a charge is erroneous and properly refused which assumes that the defendant might be legally justified in committing the assault and battery, upon the ground that his son had been so punished.

APPEAL from the County Court of Elmore.

Tried before the Hon. H. K. LANCASTER.

On December 31, 1900, an affidavit was made before the judge of the county court charging the appellant with an assault on L. N. Duncan, and a warrant was issued thereon charging him with assault and battery.

The regular term of the court convened on the third Monday, which was the 19th day of August. (Local Acts, 1898-99, p. 257.) The jury was summoned to appear on that day, but the venire was not returned into court by the sheriff until September 2. The record shows that on August 19, the judge ordered the court adjourned until September 2, which order was entered by the clerk, but no order was made in reference to the jury.

Defendant objected by plea that he could not be put to trial as the term being held was not a regular term, that no jury trial could be had except at a regular term, and he was entitled to a jury trial. The court overruled this plea and held it for naught and forced defendant to go to trial. Defendant raised the same objection by offering evidence in support of his plea, but the court overruled it, and he duly excepted.

Defendant filed a plea of former jeopardy in that he had been, on February 21, 1901, in the same court, tried and convicted, on a warrant sworn out on December 20, 1900, charging him with disturbing an assemblage met for school purposes or holiday, which the plea avers was created at the Fifth Agricultural School at Wetumpka, on December 20, 1900, by defendant assaulting and beating one L. N. Duncan, and from no

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other cause or act of defendant; that defendant struck Duncan only once, and for this, his only act, he was convicted on the charge of disturbance, etc., as aforesaid, in February, 1901; that the assault and battery here charged is the same identical act, and not otherwise, for which he has already been prosecuted and convicted on the charge of disturbance, etc. There was no demurrer to this plea. The State replied, admitting the prosecution and conviction of disturbance, etc., and that such disturbance consisted of the assault and battery at the school on December 20, 1900, but denying that defendant had been tried for an assault and battery on Duncan on December 20, at the school, and denied that defendant had ever been tried for the offense of assault and battery on Duncan on that date, or that the offense for which the defendant was tried in February was the same offense as that for which he is now on trial.

To this replication defendant demurred on the following grounds in substance: 1. That the replication fails to set up facts independent of or *dehors* the plea that justified the further prosecution of defendant. 2. That the replication neither confesses nor denies material averments of the plea, nor sets out new or independent facts justifying the further prosecution of this suit. The court overruled the demurrer to the replication and defendant excepted.

The evidence showed that Duncan was a teacher in the Agricultural school on December 20, 1900, and during the day before had chastised his pupil, Earle Walkley, the son of the defendant; that there was an entertainment in the auditorium of the school in the night of that day, and defendant there assaulted and beat Duncan by striking him one blow. There was evidence for defendant tending to show that Duncan's chastisement of defendant's son was immoderate and did him very considerable bodily harm; while there was evidence for the State tending to show that said punishment was not severe or immoderate.

Defendant's counsel in the course of the argument to the jury after reading parts of 1 Blackstone's Commentaries, p. 449, proposed and offered to read therefrom the

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following: "Nay, when a man's son was beaten by another boy and the father went near a mile to find him and there revenge his son's quarrel by beating the other boy of which he afterwards unfortunately died, it was held not to be murder, but manslaughter merely. Such indulgence does the law show to the frailty of human nature and the workings of parental affection." This had been previously read to the court in arguing the competency of testimony, and when counsel proposed and was proceeding to read it to the jury, the court, *ex mero motu*, directed and ordered counsel not to read it to the jury, and defendant duly excepted.

Defendant asked the following written charge, which was refused: "The jury may look to the relation between defendant, Duncan, and defendant's son (Earle) the pupil who was chastised, in mitigation or justification, if they find from all the evidence that defendant honestly and candidly believed that his child had been cruelly or immoderately punished by said Duncan." To the refusal to give this charge, defendant excepted.

The defendant was convicted of an assault and battery, and fined \$150, and from this judgment of conviction he prosecutes the present appeal.

JOHN H. PARKER and WATTS, TROY & CAFFEY, for appellant.—It will not be denied that if the offense for which appellant had already been convicted was the same as the one for which he was being tried, or the one necessarily included the other, the defense of former conviction is made out.—Const., I, § 10; *Moore v. State*, 71 Ala. 307, and many other cases cited on p. 111 of Criminal Code.

"A replication must either traverse or confess and avoid the matter pleaded, or present matter of estoppel thereto."—*Winter v. Bank*, 54 Ala. 172.

The plea of former conviction presented a complete defense.

As matter of law, where the two prosecutions were based on the same act, the offenses were identical in the sense of constitutional prohibition against double jeopardy; and the offenses of disturbing a school as-

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sembly and assault and battery were the same, or one necessarily included the other.—*Commonwealth v. Miller*, 5 Dana. (Ky.), 320; *Johnston v. State*, 12 Ala. 840; *Moore v. State*, 71 Ala. 310-11; *Hurst v. State*, 68 Ala. 604; *Sanders v. State*, 55 Ala. 42; *O'Brien v. State*, 91 Ala. 25, 29.

CHAS. G. BROWN, Attorney-General, for the State.

SHARPE, J.—A court has inherent power to adjourn its sittings from time to time within the time allowed by law for holding the term. In general such power is essential to the convenient and proper disposition of business and its exercise works merely a postponement of business and not in any sense an ending of the term. Under the act regulating terms of and procedure in the county court of Elmore county (Local Acts, 1898-99, p. 257) regular terms “may continue till the business is disposed of,” and jury trials though unauthorized except at regular terms may be held at any time during such terms. When the defendant was tried there had been no adjournment of the term *sine die*, but the court was being held pursuant to a temporary adjournment from one day to another day of the regular term,—and hence the contention that the court was sitting in special session without power to try with juries is unwarranted.

The replication by not denying impliedly admitted the matters averred as facts in the plea of former conviction and construed, as the rules of pleading require, most strongly against the pleader, its averment that the offense for which the defendant had been previously convicted was not the same for which he was presently prosecuted, must be taken as an averment merely that the two offenses though created by the same act were different in law. Such difference as the law attaches by name and punishment to several consequences of a single criminal act, results of course from the law itself, and if proper to be asserted in opposition to the plea, was matter for demurrer and not for a replication, the office of which, if not traversing the plea, is confined to setting up issuable facts in avoidance or estoppel. The

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effect of this replication was to thwart the plea and place the defendant at disadvantage by turning the issue upon the averment of a legal conclusion. In overruling the demurrer to the replication there was error for which the judgment must be reversed.

The record raises no question as to the merits of the plea. As bearing on that subject reference may be made to the following among other authorities: *Johnson v. State*, 12 Ala. 840; *O'Brien v. State*, 91 Ala. 25; *Hurst v. State*, 86 Ala. 604; *Moore v. State*, 71 Ala. 307.

The charge requested was argumentative and bad also in assuming that defendant might be legally justified in committing the assault and battery on no other provocation than the punishment received by his son on the day previous.

The court did not err in refusing to allow defendant's counsel to read law to the jury.

Reversed and remanded.

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Indictment for Embezzlement.

1. *Embezzlement; what necessary to constitute statutory offense.*

In order to sustain a conviction for the offense of embezzlement by a clerk or agent under the statute (Code, § 4659) it must be proved (1) that the accused was the clerk, agent, servant or apprentice of a private person; (2) that the money came into his possession by virtue of his employment; (3) that he embezzled or fraudulently converted it to his own use or fraudulently secured it with the intent to convert it to his own use; and on a trial under an indictment for embezzlement, where there is no evidence tending to show that the defendant either received, from or for his employer, any money which he could possibly convert or embezzle, the defendant can not be convicted.

APPEAL from the County Court of Macon.
Tried before the Hon. M. B. ABERCROMBIE.

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The appellant in this case was prosecuted and convicted in the county court of Macon county, for embezzlement. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

JENKS & BLUE, for appellant, cited *Pullam v. State*, 78 Ala. 31; *Brewer v. State*, 83 Ala. 113; *Lucas v. State*, 62 Ala. 26; *Walker v. State*, 117 Ala. 42.

CHAS. G. BROWN, Attorney-General, for the State, cited 10 Am. & Eng. Ency. Law, 1026; *State v. Baumhager*, 28 Minn. 226; *Kerr v. People*, 110 Ill. 645; *Brown v. State*, 10 Ohio St. 497.

HARALSON, J.—For a “clerk, agent, servant, or apprentice of any private person or persons,” to be guilty of embezzlement under the statute, he must have fraudulently converted to his own use, or the use of another, money or property which came into his possession by virtue of his employment.—Code, § 4659.

For a conviction of the offense, it has been held, it is essential that the prosecution establish the propositions, (1), that the accused was the clerk, agent, servant, or apprentice of a private person; (2), that the money or property came into his possession by virtue of his employment; (3), that he embezzled, or fraudulently converted to his own use, or fraudulently secreted it with intent to convert it to his own use.—*Pullam v. State*, 78 Ala. 31; *Reeves v. State*, 95 Ala. 41.

Waiving the question whether or not the defendant was the agent of the prosecutor, and the alleged errors of the court in the exclusion of evidence offered by defendant for the purpose of showing that he was not the employe or agent of the prosecutor, there is nothing in the evidence tending to show that defendant ever received from or for him any money which he could possibly convert or embezzle. The charge of embezzlement for which the State elected to prosecute was, that in the account which defendant rendered for his expenses incurred while in the services of the prosecutor, there is an item, of May 9th, 1900, of 35 cents for one meal, paid to W. M. Bates, the contract being that prosecutor

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was to pay defendant's expenses while traveling. The proof relied on by the State to convict was, that this was a false charge, which it introduced evidence tending to show,—the defendant, on the other hand, introducing evidence tending to show that it was a correct charge. But, whether correct or not, one of two things remains true, first, if not correct, then no money was paid out for the meal and there could have been no misappropriation or conversion of it; and second, if the amount was actually paid as defendant deposed it was, it was as yet his own money, since there is no evidence that the prosecutor ever advanced it, or any other sum to him with which to pay expenses, or that defendant collected for prosecutor funds out of which the amount was retained; and in either case, the crime of embezzlement of the amount was impossible. If the charge was false, made with the view of charging the prosecutor with that much more than defendant actually paid out by way of expenses, and to that extent to gain an advantage of prosecutor on final settlement for services rendered, of whatever offense, if any, the defendant may have been guilty, it could not have been of embezzlement in such a transaction.

The court, therefore, erred in not charging the jury as requested by defendant, that if they believed the evidence they must find for defendant.

Reversed and remanded.

Levy v. The State.

Indictment for Selling or Soliciting the Sale of Liquors contrary to Law.

1. *Soliciting sale of liquor in prohibition district; shipment not necessary to complete offense.*—Under an indictment for soliciting or receiving an order for spirituous, vinous or malt liquors in a district in which the sale of such liquors is prohibited by law (Code, § 5087), an actual shipment of the liquor ordered is not necessary to complete the offense

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charged; and, therefore, a charge is erroneous and properly refused which instructs the jury "that merely soliciting or receiving an order for liquor," in the prohibited district, "which is not shipped on that order, is no offense under the law."

APPEAL from the County Court of Bibb.

Tried before the Hon. W. L. PRATT.

The indictment under which the appellant was tried contained three counts. The first two counts charged the defendant with selling spirituous, vinous or malt liquors in Bibb county without a license and contrary to law. The third count charged that the defendant Mose Levy within the limits of the district in which the sale of spirituous, vinous or malt liquors was prohibited by law, had solicited or received from William Kemp an order for spirituous, vinous or malt liquors to be shipped into such district against the peace and dignity of the State of Alabama."

The testimony of the witness Kemp both on his direct and cross examination is sufficiently stated in the opinion.

The defendant as a witness in his own behalf testified that while he was at Blocton, William Kemp asked him to send him two quarts of whiskey, but that the defendant told Kemp that he could not send the whiskey as he, Kemp, was a minor. The defendant further testified that after he returned to Birmingham, he received an order from the father of William Kemp and upon said order he sent the whiskey into Bibb county.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "I charge you, gentlemen of the jury, that merely soliciting or receiving an order for liquor in Beat 10, Bibb county, which is not shipped on that order is no offense under the law." (2.) "I charge you, gentlemen of the jury, that you must find the defendant not guilty."

The defendant was convicted for the offense charged in the third count, and from that judgment of conviction he prosecutes the present appeal.

No counsel marked as appearing for appellant.

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CHAS. G. BROWN, Attorney-General, for the State.

SHARPE, J.—By an act approved February 28th, 1881, (Acts, 1880-81, p. 187), the sale of spirituous, vinous and malt liquors in Bibb county is prohibited. Section 5087 of the Code makes punishable as for a misdemeanor “any person who within the limits of any district in which the sale of spirituous vinous or malt liquors is prohibited by law, solicits, or receives any order for spirituous, vinous or malt liquors to be shipped or sent into such district,” etc.

The State's witness testified on direct examination that defendant was a representative of a “whiskey house” in Birmingham, which city we judicially know to be out of Bibb county. He further testified that on one occasion defendant being in Bibb county asked him, the witness, if he could send him anything this time, that he, the witness, answered “yes, two quarts;” that meant two quarts of whiskey, and that he got the whiskey, and that his father paid for it. On cross examination the witness said “the way of it was that he asked defendant to send him two quarts and defendant told him that he could not; that he, witness, was a minor, and that he could not send it to him without his father's consent.” The apparent conflict between the first and last of these statements did not as matter of law, require the rejection of either statement though the same witness made them both, but the conflict was for the jury to pass upon. The first statement if believed might well have been interpreted by the jury as a solicitation by defendant of an order for the shipment of whiskey into Bibb county.

An actual shipment of liquor is not necessary to complete the offense prohibited by the Code section referred to, as is assumed by charge 1 refused to defendant.

Judgment affirmed.

[Kicker v. The State.]

Kicker v. The State.

Indictment for Gaming.

1. *Gaming; house where game played within the statute.*—On a trial under an indictment charging that the defendant bet money at a game played with cards at a “storehouse for retailing spirituous liquors or house or place where spirituous liquors were at the time sold, retailed or given away,” it was shown that the game was played in a room in the second story of a store; that in the room there were a bed with a mattress on it, and table and chairs; that in the first story or ground floor of said building there was a storehouse for retailing spirituous, vinous or malt liquors; that to reach the room where the game was played there was a stairway which led from the sidewalk to the second story, and there was a wooden partition which separated the stairway from the store and extended from the stairs to the ceiling; that there was no opening between the stairway and the store; and that there was no opening connecting the room where the game was played with the storeroom underneath where the liquor was sold, but it was all in the same building. *Held:* That such place of gaming came within the provisions of the statute (Code, §§ 4792-4797).

APPEAL from the City Court of Montgomery.

Tried before the Hon. WILLIAM H. THOMAS.

The appellant was indicted, tried and convicted for betting at a game of cards played at a “tavern, inn, storehouse for retailing spirituous liquors, or house or place where spirituous liquors were at the time sold, retailed or given away,” etc. The facts of the case are sufficiently stated in the opinion.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) “If the jury believe the evidence, they must find the defendant not guilty.” (2.) “If the jury have a reasonable doubt as to whether the game was played in a private bed-room and that the game did not take place

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at either the places denounced by the statute, then they must find the defendant not guilty." (3.) "If the jury have a reasonable doubt as to whether the defendant bet or played at a game with cards at a tavern, inn, storehouse for retailing spirituous liquors, etc., house or place where spirituous liquors were at the time sold, retailed or given away, or in a public place or some other public place, or at an outhouse where people resort, then they must find the defendant not guilty."

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State, cited *Johnson v. State*, 19 Ala. 527; *Huffman v. State*, 29 Ala. 40; s. c. 30 Ala. 532.

DOWDELL, J.—The defendant offered no evidence. The evidence introduced by the State was without conflict, and showed that the defendant in October, 1901, and before the finding of the indictment, in Montgomery county bet money at a game played with cards. That the game was played in a room in the upper story of O'Rear's store in the county and city of Montgomery. That the room used, and the one in which said game was played, was in a two story building, the room being in the second story of said building. That in the room was a bed with mattress on it, a table and chairs. That in the first or ground floor of said building there was a storehouse for retailing spirituous, vinous and malt liquors, which was occupied by said O'Rear as a store, and liquors were kept by said O'Rear in said store for sale. That to reach said room where said game was played there was a stairway that led from the sidewalk in front of said store to the second story of said building. That there was a wooden partition that separated the stairway from the store occupied by O'Rear, that extended from the stairs to the ceiling. That there was no opening between said stairway and the said store. That during the time the game was played, which continued the greater part of the day, the defendant,

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with several others, came into and went out of said room by the stairway that entered said building from the street. That there was no opening connecting the room where the game was played and the store room underneath occupied by O'Rear, but it was all the same building and known as O'Rear's. On this undisputed evidence and under the decisions by this court in the following cases: *Johnson v. State*, 19 Ala. 527; *Brown v. State*, 27 Ala. 47; *Huffman v. State*, 29 Ala. 40; s. c. 30 Ala. 532, the court properly gave the general affirmative charge as requested in writing by the State, and committed no reversible error in refusing the charges requested by the defendant. There were no other exceptions reserved.

There is no error in the record, and the judgment will be affirmed.

Kelly v. The State.

Bastardy Proceeding.

1. *Bastardy proceeding; competent to make proof of child before the jury.*—In a bastardy proceeding, it is competent for the State to make proof of the bastard child before the jury, for the purpose of showing its resemblance to the defendant.
2. *Same; evidence of prosecutrix's association with other men.* On a trial in a bastardy proceeding, where the State has proven the defendant's association with the prosecutrix about the probable date of conception, it is competent for the defendant to introduce evidence showing that about the same time the prosecutrix associated with other men, particularly with a certain named man on an occasion and under circumstances affording opportunity for illicit relations.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. JOHN MOORE.

This was a bastardy proceeding, in which the appellant, Willis Kelly, was tried and found guilty of being the father of the bastard child of Florence Stephens.

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On the trial of the case the evidence for the State showed that Florence Stephens was delivered of a bastard child on July 27, 1900. The State, for the purpose of showing the likeness of the child to the defendant, proposed to offer the child in evidence, so the jury could view it; the defendant objected to the introduction in evidence of the child, but the court overruled the objection, and permitted the child to be introduced in evidence, and the defendant duly excepted to the ruling of the court. Defendant, the child and the mother are all white persons.

There was testimony in behalf of the State to show that during the month of October, 1899, (the month prior to the time the State contended the child was conceived), the defendant associated with Florence Stephens, having been frequently in her company; and to rebut this testimony, the defendant offered to show that during such time she was also seen in company of other men; and he proposed to prove by one Sellers and one Barr, that they saw her at Alameda about sun down on the fourth Sunday in October, drinking cider with a young man other than defendant; that Alameda is about two miles distant from her home; that she and the young man left Alameda alone, going in the direction of her home; that one of the witnesses drank some of the cider and it made him drunk; that the road from Alameda to her home leads mostly through the woods. The State objected to this evidence, and moved to exclude it, and the court granted the motion, and the defendant duly excepted.

LACKLAND & WILSON for appellant, cited 3 Amer. & Eng. Encyc. of Law, (2d ed.), 885, and cases cited.

CHAS. G. BROWN, Attorney-General, for the State, cited *Miller's Case*, 110 Ala. 86; *State v. Woodruff*, 67 N. C. 91; *State v. Britt*, 78 N. C. 439; *Lenton v. State*, 88 Ala. 218; *Paulk v. State*, 52 Ala. 427; *Finnegan v. Dugan*, 14 Allen, 197; Wharton's Crim. Evidence, § 312, p. 233.

MCCLELLAN, C. J.—There is in *Paulk v. State*, 52 Ala. 427, this dictum: "On an issue formed in a bastard-

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ardly proceeding, it is doubtless competent for the defendant to prove that the child bears no likeness or resemblance to him, or that it resembles some other person, who had opportunities of illicit intercourse with the mother." It would necessarily follow that the prosecution upon such issue would be entitled to show that the child resembled the defendant; and, logically, that in such case it would be competent to make proof of the child before the jury to show its resemblance, or lack of resemblance to the putative father. In *Linton v. State*, 88 Ala. 216, the charge was miscegenation of the defendant Linton, a white woman, with John Blue, a negro; and of the propriety of allowing the prosecution to prove Blue's race by producing his person before the jury, this court said: "There was no error in allowing the State to make proof of the person of John Blue to the jury, in order that they might determine by inspection whether he was a negro, as charged in the indictment. There had been a severance in the trials of appellant and Blue; and evidence of this character is clearly competent to show sex (*White v. State*, 74 Ala. 31); age (*State v. Arnold*, 13 Ired. 184); personal resemblance (*State v. Woodruff*, 67 N. C. 439); color and race (*Garvin v. State*, 52 Miss. 207; *Gentry v. McMinis*, 3 Dana, (Ky.), 385), and many like facts in regard to the personality of the defendant himself, or of any other individual involved in the issue.—Whart. Cr. Ev., §§ 311 *et seq.*" The question in *Linton's case*, being one of race and not of resemblances, is not the question here; and that case is not authority here, but we have quoted from the opinion in that case to show our citation there with approval of the cases of *State v. Woodruff*, 67 N. C. 89, and *State v. Britt*, 78 N. C. 439, both of which were bastardy cases, and in one of which evidence of the child's resemblance to the defendant given by the midwife was received, and in the other it was held competent to make proof of the child to the jury to show its resemblance to the defendant. It is thus made to appear that in *Linton's case*, as well as in *Paulk's*, there is a *dictum* of this court to the effect that in bastardy proceedings proof may be made of the child. We shall hold in line with these *dicta*, and indorse the rul-

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ing of the circuit court in this connection. Much may be said as to the uncertainty of such evidence, and there are authorities against its competency as well as for it; but evidence should not be rejected merely on the ground that its bearing is not of a given degree of certainty, and while evidence of this sort may in point of fact often throw little light on the issue, or none, it may, we think, be submitted for the jury's consideration as affording in most cases the basis for reasonable deductions on their part. The court committed no error in allowing proof of the child to the jury.

We are, however, of the opinion that the court erred in excluding the evidence offered by the defendant of the association of the prosecutrix with others, and particularly with another young man about the probable date of conception, and the circumstances of such association; the State having proved defendant's association with her about that time as affording an inference that he then had sexual intercourse with her. It seems clear to us that the proposed testimony of the witnesses Sellers and Barr, that covering the time of probable conception she was in the company of other men and that on one occasion nine months before the birth of the child she was in company of another man under circumstances affording opportunity for sexual intercourse, his attentions to her at that time, etc., etc., was competent in rebuttal of the inference intended to be and naturally afforded by the evidence introduced by the State as to the association of defendant with her about that time.

For the rejection of this evidence the judgment must be reversed. The cause is remanded.

[State of Alabama *ex rel.* Scott v. Waller, Sheriff, Etc.]

State of Alabama *ex rel.* Scott v. Waller, Sheriff, Etc.

Application for Mandamus.

1. *Mandamus*; assignee of decree can not compel the issuance of restraining order to sheriff out of another court than the one rendering the decree.—Where, after the levy of an execution issued upon a decree rendered by a chancery court, the complainant is said suit assigns the decree, and upon the request of the assignee to release the levy of said execution, the sheriff refuses to do so, the assignee of such decree can not, by filing a petition for *mandamus* in another court, obtain a writ commanding the sheriff to release said levy and restraining him from selling or attempting to sell the property levied upon.

APPEAL from the City Court of Montgomery.

Heard before the Hon. A. D. SAYRE.

The facts of this case are sufficiently shown in the opinion. The demurrer which was filed to the petition assigned substantially the following grounds: 1. Said petition and rule show that the relator has another and adequate remedy at law. 2. Said petition and rule fail to show that relator has any specific right. 3. Said petition and rule show that if any injury is done by the enforcement of the execution in controversy, it will be to the respondent in the decree, and not to the relator. 4. Said petition and rule show that the rights of a third party who can not be made a party to the proceeding will be decided without an opportunity of being heard. 5. Said petition and rule show that the grant of a writ of *mandamus* would necessitate the decision collaterally of the rights of a person who is not a party, and who has not the opportunity to be heard. 6. Said petition and rule show that respondents would be required to pass upon the validity of the assignment of the decree in question and still be liable to the true owner if said assignment be invalid.

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[State of Alabama *ex rel.* Scott v. Waller, Sheriff, Etc.]

From the judgment of the court sustaining the demurrer and discharging the rule nisi and dismissing the petition, the present appeal is prosecuted and the rendition of said judgment is assigned as error.

GORDON MACDONALD and GEORGE F. MOORE, for petitioner, cited *State ex rel. Snethry v. Turner*, 11 S. E. Rep.; *Texas Mer. R. Co. v. Jarvis*, 15 S. W. Rep. 1089; *Livingston v. McCarthy*, 41 Kan. 478; *Quar. Wo. Cheeng v. Loumister*, 83 Cal. 384; *People v. Adams*, 18 N. Y. 896; *Bolen v. Crosby*, 49 N. Y. 183; *Vila v. Weston*, 33 Conn. 50; *Burns v. Bangert*, 16 Mo. App. 22; *Applegate v. Mason*, 13 Md. 75; *Ullman v. Cline*, 87 Ill. 268; *Horman v. Hope*, 87 N. Y.; *Miller v. Dugan*, 36 Iowa, 433.

WILLIAM C. OATES and HARMON. DENT & WEIL, *contra*, cited *Ex parte Dubose*, 54 Ala. 278; *Murphy v. Egger*, 59 Ala. 639.

HARALSON, J.—It may be stated generally as true, that when the plaintiff has ceased to have any interest in a judgment or decree of a court in his favor, by reason of his having assigned it to another, his right to control the process has ceased, and the assignee may control the execution.—1 Freeman Ex. p. 61, § 21.

"The invariable test by which the right of a party applying for *mandamus* is determined, is to inquire, first, whether he has a clear legal right; and if he has, then, secondly, whether there is any other adequate remedy to which he can resort to enforce his right."—*Withers v. State*, 36 Ala. 252; *Murphy v. State*, 59 Ala. 640.

It is a well recognized principle, that each court, by virtue of its inherent powers, has control over its processes, such as enables it to act for the prevention of all abuse thereof; and the power to stay proceedings for the purpose of exercising equitable control over the parties or proceedings, to the end that justice may be promoted, is everywhere conceded to be inherent in courts of general jurisdiction.—1 Freeman on Executions, § 32; 20 Ency. Pl. & Pr., 1252.

Again, it seems clear, "that an order to stay proceedings cannot be made, as a general rule, except by the

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court where the proceedings or execution remain, and the motion must be made to a court having jurisdiction of the matter."—20 Ency. Pl. & Pr., 1276; Freeman on Ex., § 32.

In this case, as shown by the petition, one Reeves, on the 13th January, 1902, obtained a decree in the chancery court of Montgomery county, against Mary A. Scott as executrix, J. P. Knabe and James Chappel, for \$2,735.81; that an execution was issued on said decree in favor of the complainant therein and placed in the hands of the sheriff of Montgomery county, which was levied by him on lands belonging to James Chappel, one of the defendants; that on the 3d February, 1902, after the issuance of said execution and before its return, Gaston Scott, for a valuable consideration, purchased said decree from the complainant, Reeves, and obtained a written assignment of it from her; that thereupon said Gaston Scott presented to said sheriff an order to release the levy of said execution and return the same to the chancery court whence it issued, which the sheriff refused to do.

Thereupon, on the 21st February, 1902, said Gaston Scott presented this petition to the Hon. A. D. SAYRE, judge of the city court of Montgomery, stating the foregoing facts, alleging that petitioner had no legal remedy in the premises save by the writ of *mandamus* from that court, praying for an alternative writ of *mandamus* to issue out of that court directed to W. R. Waller, sheriff of Montgomery county, commanding him to release said levy, and return the execution to the said chancery court of Montgomery, and that, on final hearing, said sheriff "be restrained from selling or attempting to sell said land so levied on under said execution, and that he be ordered to take no steps regarding the enforcement of said execution until the further order of said city court."

The respondent demurred to the petition on many grounds, and moved to dismiss the same. The cause coming on to be heard in said court on the demurrer and motion to dismiss the petition, the demurrer was sustained, the rule *nisi* which had theretofore been granted was discharged, and the petition dismissed. This appeal is to reverse that decree.

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We have no difficulty in holding, under the foregoing principles and authorities, that the petitioner had another and adequate remedy; that he ought to have applied to the chancery court in which the decree was rendered, on which the execution was issued, for an order on the sheriff to release the levy, and return of the execution. It was the province of that court, and not of the city court of Montgomery, if complainant was entitled to any relief, to grant the same upon the proper presentation of a case for relief, and upon the proof thereof. For the city court to interfere to control said execution, in the manner prayed, if not a breach of comity between courts of the character of these two, might lead to complications of jurisdiction of an unfortunate character. The remedy, if complainant was entitled to any, was as open to him in the chancery as in the city court, and he should have resorted to the former and not to the latter court.

It is unnecessary to consider other grounds of demurrer.

Affirmed.

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Prosecution for Selling Liquor to a Person of known Intemperate Habits.

1. *Selling liquor to persons of known intemperate habits; constituents of offense; burden of proof.*—To authorize a conviction under a prosecution for selling liquor to a person of known intemperate habits, it is necessary to show (1) that the defendant sold spirituous, vinous or malt liquors to the person named; (2), that such person was of intemperate habits; and, (3), that the defendant had knowledge of his intemperate habits; and the burden of establishing each and all of these facts is upon the State.
2. *Same; proof of known intemperate habits; admissibility of evidence.*—For the purpose of showing that the defendant had knowledge of the intemperate habits of the person to whom he is charged with having sold spirituous liquor, it is com-

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petent for the State to prove the contents of a paper in the defendant's possession which was written him by the wife of the person of known intemperate habits, in which she told the defendant of such habits, and it is not necessary as a condition precedent to the admission in evidence of such testimony, that the State should have demanded of the defendant the production of the letter.

3. *Same; same; same.*—For the purpose of showing that the defendant had knowledge of the known intemperate habits of the person to whom he is charged with having sold spirituous liquors, it is competent for the brother of said person to whom the liquor was alleged to have been sold to testify that he had told the defendant not to sell whiskey to his brother, and further for the State to prove by other witnesses, that said person was frequently within twelve months preceeding the trial, under the influence of intoxicants; and, likewise the testimony of such person's brother that he had been a man of intemperate habits for six years, is admissible in evidence.
4. *Witness; competent to show interest as affecting credibility.* The interest of the witness in a cause in which he testifies may always be shown as affecting the credibility of his testimony; and in a prosecution for the sale of liquor to a person of known intemperate habits, where the employer of the defendant testifies to facts which exonerate the defendant, it is competent for the State to ask such witness if there was not then pending against him a prosecution for the same offense.
5. *Charge of court to jury; when defendant can not complain.* The defendant can not complain of a portion of the oral charge of the court which is too favorable to him, in that it exacts too high a degree of proof.
6. *Abstract charges are properly refused.*
7. *Selling liquor to person of known intemperate habits; charge of court.*—In a prosecution for selling spirituous liquors to a person of known intemperate habits, where the State elects to prosecute for a sale alleged to have been made on August 7, and there was evidence on the part of the defendant tending to show that on August 6 he was returning officer at the general election and did not finish the count until ten o'clock on August 7, when he went to the saloon where the sale was alleged to have been made, and remained there between fifteen and thirty minutes and then went home and slept until six o'clock in the evening, but there was positive evidence on the part of the State that the defendant sold

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whiskey to a designated person on August 7th, a charge is erroneous and properly refused which instructs the jury that "if you believe from the evidence that defendant was a returning officer of the election on August 7th, and went to the Palace Saloon and between fifteen and thirty minutes went to Pattons or Lands, and then went home and slept until 6 o'clock that evening, your verdict should be for the defendant."

APPEAL from the County Court of Morgan.

Tried before the Hon. WILLIAM E. SKEGGS.

The appellant in this case, Ben McCormack, was prosecuted and convicted for selling spirituous, vinous or malt liquors to a person of known intemperate habits. It was shown by the evidence that the defendant had made several sales of whiskey to one Charles S. Aycock. The State elected to prosecute for the sale alleged to have been made on August 7, 1900. Several witnesses for the State testified that the defendant sold whiskey to the said Charles S. Aycock on the evening of August 7. The wife of said Aycock testified that her husband had been drinking to excess during the year previous to said alleged sale and that she had given the saloon keepers notice not to sell him intoxicating liquors.

Said Charles S. Aycock, as a witness, testified that he had been drinking heavily and was able to get whiskey from the defendant up to the time notice had been given by his wife not to sell him any more. The solicitor then asked the witness if the defendant showed him the paper he had received from his wife telling him not to sell the witness any whiskey; at the same time handing said paper to the witness. The defendant objected to this question, because it was irrelevant and immaterial evidence, and duly excepted to the court's overruling his objection. The witness answered that he did. The solicitor then asked the witness the following question: "Did the paper shown you by the defendant state in it not to sell you on account of known intemperate habits?" The defendant objected to this question, because it called for irrelevant and immaterial evidence, and because it was not the best evidence of the contents of the paper,

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and because no demand was made on defendant to produce the same. The court overruled the objection, and the defendant duly excepted. The witness answered that it did, but that after such notice he had bought whiskey from defendant almost every day in 1900 until the filing of the affidavit in this case.

Lee Aycock, a witness, against the objection and exception of the defendant, testified that he had also notified the defendant not to sell whiskey to said Charles S. Aycock, his brother. There was other evidence introduced by the State tending to show that said Charles S. Aycock was a man of known intemperate habits.

The evidence for the defendant tended to show that he did not sell whiskey to said Charles S. Aycock on August 7, 1900.

Charles E. Woodward, who was proprietor of the Palace saloon where the defendant was employed as a bartender, testified that he was in the saloon on August 7, 1900, continuously up to the time he went to supper; that between 10:30 and 11 o'clock in the day, the defendant came into the saloon with another person, got a drink and left in a few minutes, but that the defendant did not go behind the counter, nor did he make any sale during the day of August 7, 1900. The solicitor asked said witness the following question: "You have a prosecution pending against you for the same offense, have you not?" The defendant objected to this question upon the ground that it called for irrelevant and immaterial evidence. The court overruled the objection, and the defendant duly excepted. The witness answered that there was a prosecution pending against him.

The defendant, as a witness in his own behalf, testified that he was the clerk at the general election on August 7, 1900; that he sat up all night counting the votes and finished about 10 o'clock on the morning of August 7; that he, in company with another person, went to the Palace saloon, where he was accustomed to clerk, and took a drink, and that after remaining there a few minutes, left and went home and went to bed, where he remained until about 6 o'clock in the evening, when he got up and ate his dinner and supper together; that he did not leave the house until after supper and was not

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in the Palace saloon on August 7, except as stated above, and until after supper, but that he was not at the saloon on that day and made no sales to Aycock or any one else that day. There was other evidence introduced on the part of the defendant tending to corroborate his testimony. The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The court in its general charge to the jury, among other things, instructed them as follows: "It devolves upon the State to prove to your satisfaction a sale of liquor by defendant to Chas. S. Aycock on August 7th, 1900." The defendant duly excepted to the giving of this portion of the court's general oral charge, and also separately excepted to the court's refusal to give each of the following written charges requested by him: (1.) "If you believe the defendant was at home asleep from about eleven o'clock on August 7th, 1900, until night, your verdict should be for the defendant." (2.) "If you believe from the evidence that defendant was a returning officer of the election on August 7th, and went to the Palace saloon and between fifteen and thirty minutes went to the Pattons or Lands, and then went home and slept until 6 o'clock that evening, your verdict should be for the defendant."

No counsel marked as appearing for appellant.

CHAS G. BROWN, Attorney-General, for the State.

TYSON, J.—This appeal is prosecuted from a judgment of conviction upon the charge of selling spirituous, vinous or malt liquors to a person of known intemperate habits. To authorize the conviction, the sale must be made to a person of intemperate habits and the seller must have been shown to have had knowledge of such habits. In other words the jury must be convinced by the evidence beyond a reasonable doubt of the existence of these facts: the sale of spirituous, vinous or malt liquors, the intemperate habits of the person to whom the sale is alleged to have been made, and a knowledge on the part of the defendant of such habits.—*Jones*

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v. The State, 100 Ala. 88. Of course, the burden of establishing each and all of these facts is upon the State. For the purpose of tracing knowledge to the defendant of the intemperate habits of Aycock it was entirely competent for the State to prove the contents of the paper in defendant's possession written by Aycock's wife in which she told him of his habits. Nor was it necessary for the State, before being allowed to offer this evidence, to have demanded of defendant the production of the letter. So, too, there was no error in permitting witness Lee Aycock to testify that he had told defendant not to sell his brother whiskey. Likewise it was competent for the State to prove by Brock that Aycock was frequently within the twelve months preceding the trial under the influence of intoxicants. The same may be said of the statement of the witness Will Aycock that his brother had been a man of intemperate habits for the past six years. This testimony not only tended to show the habits of Aycock, but also knowledge on the part of the defendant of those habits.—*Atkins v. The State*, 60 Ala. 45; *Smith v. The State*, 55 Ala. 1; *Tatum v. The State*, 63 Ala. 147.

The interest of a witness in the cause may always be shown as affecting the credibility of his testimony. It was doubtless upon this theory that the solicitor was permitted on cross-examination of Woodward, the proprietor of the Palace saloon and the employer of the defendant, to ask him if a prosecution was not pending against him for the same offense. There was no error in this.

The exception to the portion of the oral charge of the court can avail the defendant nothing. It was too favorable to him, in that it exacted too high a degree of proof. It required the State to prove to the satisfaction of the jury a sale of the liquor by defendant, etc. "Before it can be said that the mind is satisfied of the truth of a proposition, it must be relieved of all doubt or uncertainty, and this degree of conviction is not required" in any case.—*Torrey v. Burney*, 113 Ala. 504; *Dennis v. The State*, 118 Ala. 79; *L. & N. R. R. Co. v. Gidley*, 119 Ala. 527; *A. G. S. R. R. Co. v. Burgess*, *Id.* 564; *Abbott v. City of Mobile*, *Id.* 599; *Moore v. Heineke*, *Id.* 639; *Coghill v. Kennedy*, *Id.* 667.

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Charge 1 refused to defendant was abstract. There was no evidence that defendant was at home asleep from about 11 o'clock on August 7th until night. On the contrary the evidence shows that he ate his dinner and supper together about the hour of 6 o'clock in the afternoon of that day.

Every fact postulated in charge 2 may have been believed by the jury, and yet the defendant would not have been entitled to a verdict of acquittal, if the jury believe that the sale of liquor was made by him about dusk of the evening of August 7th.

There is no error in the record. Judgment affirmed.

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Indictment for Gaming.

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134 639

1. *Gaming; admissibility of evidence.*—On a trial under an indictment for gaming, where the State's witnesses testified to the defendant having played and bet at a game with dice, and that another certain named person was also in the game, it is competent for the defendant, upon cross examination of a witness, who has testified that the other person named as having played in the game was in his employ during the month the game was shown to have been played, to ask him whether said person ever got off from his work during such month; an affirmative answer to such question going to the credibility of the testimony of the State's witness as a whole.
2. *Same; same.*—On a trial under an indictment for gaming, testimony that a certain named person who was said to have been in the game at the same time the defendant was playing, was not in the county when the case was tried, is irrelevant and inadmissible.
3. *Same; same.*—On a trial under an indictment for gaming, where on the cross examination of the State's witness there was an effort made to show that he had been officious in the prosecution of gaming cases, it is permissible for the State to prove that such witness attended the grand jury in obedience to a subpoena, and not voluntarily.

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4. *Gaming; what is a place forbidden by the statute; charge to the jury.*—The back yard of a storehouse where spirituous, vinous or malt liquors are sold, when ingress and egress to and from such yard is through the back door of said store, comes within the prohibition of the statute against gaming, (Code, §§ 4792-4797); and a charge so instructing the jury on a trial under an indictment for gaming, is properly given.

APPEAL from the City Court of Montgomery.

Tried before the Hon. WILLIAM H. THOMAS.

The appellant, Frank James, was tried and convicted under an indictment which charged in two counts that he bet at a game played with cards or dice or some device or substitute for cards or dice at a tavern, inn or storehouse for retailing spirituous liquors, or storehouse or place where spirituous liquors were at the time sold, etc., and that he played at a game of cards or dice at a storehouse where spirituous liquors were sold or given away, etc.

The testimony of the witness Lee introduced by the State is sufficiently shown in the opinion. Upon this witness testifying on cross-examination that he was a witness in several gaming cases, he was asked by the solicitor on his re-direct examination the following question: "Were you subpoenaed or did you go before the grand jury voluntarily?" The defendant objected to this question, because it called for wholly illegal and irrelevant evidence. The court overruled the objection, and the defendant duly excepted. The witness testified that he did not go before the grand jury voluntarily, but was subpoenaed. The defendant moved the court to exclude this answer from the jury upon the same ground, and duly excepted to the court's overruling his motion.

Another witness for the State testified to the defendant having played and bet at a game played with dice at the back yard referred to in Lee's testimony, and stated that among others who were present was one Ed Gettings; that Gettings had been summoned as a State's witness, but was absent at that time. The solicitor for the State asked the witness the following question: "Do

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you know where Ed Gettings is now?" The defendant objected to this question on the ground that it called for illegal, irrelevant and incompetent evidence, and duly excepted to the court's overruling his objection. In answer to another question asked against the objection and exception of the defendant the said witness answered that Gettings was not in the county at that time. The defendant as a witness in his own behalf testified that he did not bet or play at a game played with dice at the place designated by the State's witness. The defendant also introduced witnesses who testified that the character of the State's witness was bad, and that they would not believe him on oath.

The other facts of the case are sufficiently stated in the opinion.

The court, at the request of the State, gave to the jury the following written charges: "The back yard of a house where spirituous, vinous or malt liquors are sold and ingress and egress to and from which are through the back door of the house, comes within the prohibition of the statute against gaming."

The defendant duly excepted to the giving of this charge, and also excepted to the court's refusal to give the following charge requested by him: "If the jury believe the evidence, they must find the defendant not guilty."

HILL & HILL, for appellant, cited *Whitaker v. State* 106 Ala. 32.

CHAS. G. BROWN, Attorney-General for the State. The place where this gaming occurred came within the prohibition of the statute.—*Napier v. State*, 60 Ala. 168. *Ray v. State*, *Id.* 172.

SHARPE, J.—In behalf of the State one Lee testified to effect that in May, 1901, defendant played and bet at dice in an enclosed back yard to which the only opening was through the back door of a store where spirituous liquors were sold; that this game began in the morning and continued until late in the day and that among others who were in the game was Dick Laws.

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In defendant's behalf Bray testified that Laws worked with him during the month of May, 1901, and defendant then asked him: "Did Dick Laws ever get off from his work during the month of May, 1901?" An objection made by the solicitor to this question was sustained.

In this ruling there was error for which the judgment must be reversed. An affirmative answer to the question would have contradicted Lee as to Law's participation in the game, and would have been relevant as going to the credibility of Lee's testimony as a whole.

The evidence introduced by the State to effect that Bettings who was said to have been in the game was not in the county when the case was tried was irrelevant.

Cross-examination of Lee having been directed to showing he had been officious in the prosecution of gaming cases, it was proper to permit the State to prove he attended the grand jury in obedience to a subpoena and not of his own volition.

In application to the evidence of this case, the charge given for the State was not erroneous; the yard being the retailing liquor store, within the meaning of sections 4792 and 4797 of the Code.

The charge requested by defendant was properly reversed.

Reversed and remanded.

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Application for Mandamus.

Mandamus; Supreme Court has no jurisdiction to issue *mandamus* directed to board of registrars.—The Supreme Court has no original jurisdiction to issue a writ of *mandamus* directed to the board of registrars of a county, to compel such board to register the petitioner as an elector; such board of registrars not being one of the jurisdictions which the Supreme Court can, under the constitution (Constitution 1901, § 140), control by original writs.

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The facts of the case are sufficiently stated in the opinion.

WILFORD H. SMITH, for petitioner.

McCLELLAN, C. J.—This application is *sui generis*. It is a petition filed originally in this court for a writ of *mandamus* to compel the board of registrars of Montgomery county to register the petitioner as an elector. The Supreme Court has no jurisdiction of the proceeding. It is not appellate jurisdiction that is invoked, and the matter is not within the very limited original jurisdiction of this court “to issue writs of injunction, *habeas corpus*, *quo warranto*, and such other remedial and original writs as may be necessary to give a general superintendence and control of inferior jurisdictions.”—Const. 1901, § 140. A board of registrars is not one of the “jurisdictions” which this court may control by original writs. And if it were, yet it can never be “necessary” for this court to control such board by any original writ, since whatever writs may under any circumstances be proper or necessary to be issued in superintendence and control of these boards may be and can only be issued by *nisi prius* courts—the circuit courts or other courts of like jurisdiction. Therefore it is that if the petitioner is entitled to the writ he here prays, a question we do not consider, his petition should be addressed to and presented in the circuit court of Montgomery county or the Montgomery city court.—Code, §§ 2825-2833 and 3826. Rule *nisi* denied.

Ex parte Jones.

Petition for Mandamus.

1. *Mandamus; when issued to correct erroneous rulings.*—While ordinarily it is not the office of a writ of *mandamus* to reverse judicial action, but to compel such action, yet a writ of

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mandamus will lie to correct an erroneous ruling of a court, where injury results and there exists no right of appeal or other adequate means of redress.

Equity practice; when complainant can dismiss bill.—As a general rule, a complainant has a right to dismiss a suit in equity whenever he elects to do so, but he can not, as a matter of right, dismiss his suit when the respondent has acquired rights in the proceeding by answer or cross bill, and would be prejudiced by such dismissal.

This was an original application for *mandamus* filed in the Supreme Court by petitioner, Winston Jones. The facts of the case are sufficiently stated in the opinion.

PETTUS, JEFFRIES & PARTRIDGE, for appellant, cited *bel v. Ins. Co.*, 92 Ala. 382; *Wilkinson v. Roper*, 74 Ala. 140; *Simmons v. Williams*, 27 Ala. 507; *Knight v. Crane*, 77 Ala. 371; *Gafford v. Proskauer*, 59 Ala. 264; *On. Life Ins. Co. v. Webb*, 54 Ala. 694; 19 Ency. Pl. & Pr., 719.

WILLIAM CUNNINGHAME, *contra*, cited Code, § 703; Ency. Pl. & Pr., 868, 879, note; *Corleton v. Darcy*, 75 Ala. 375; *Van Alen v. Schermerhorn*, 14 How. Pr. 287; *Bradford v. Andrews*, 20 Ohio St. 221; *Taylor v. Kolb*, 90 Ala. 603; *Ex parte Horn*, 92 Ala. 102.

OWDELL, J.—This is a petition for a *mandamus* to compel the chancellor to vacate an order made by him in the cause of Winston Jones v. L. D. Hardy pending in the chancery court of Marengo county, in which the chancellor on the application of Hardy set aside and annulled an order made by the register of said court in vacation, dismissing the complainant's bill, on the motion of the complainant, Winston Jones. The facts as stated in the petition show, that the petitioner, Winston Jones, filed his bill in the chancery court of Marengo county against L. D. Hardy and others, seeking a discovery and an accounting. Demurrers were interposed by the several defendants, which were sustained as to all of the defendants, except the defendant Hardy, and were overruled as to him. This decree on the demurrers was affirmed on appeal to this court.—*Jones v. Hardy*

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et al., 127 Ala. 221. The defendant, Hardy, also filed an answer, which was made a cross-bill. In his answer, after admitting certain averments of the bill, and denying others, he claimed a set-off against the demand of the complainant, which was germane to, and arose out of the matters alleged in the bill.

The defense of set-off pleaded in the answer and upon which the affirmative relief is sought by way of cross-bill, is purely legal as contradistinguished from equitable. It is matter, as to which, the cross-complainant has a complete and adequate remedy at law. And while it is proper subject for a cross-bill, where affirmative relief is prayed, it is not an independent equity, or matter of purely equitable cognizance, such as would support an original bill in the first instance. In such a case the dismissal of the original bill carries with it the cross-bill.—*Abels v. P. & M. Ins. Co.*, 92 Ala. 382; *Wilkerson v. Roper*, 74 Ala. 140.

The order of the chancellor, vacating the order of dismissal made by the register in vacation, and restoring the cause to the docket, was purely interlocutory, and from it no appeal would lie. Not being an interlocutory decree from which the statute authorizes an appeal, the only remedy left to the complainants is by *mandamus*. It is true, that ordinarily, it is not the office of this writ to review and revise judicial action, but generally to compel such action; yet, as has been decided by this court, the writ will lie to correct the erroneous ruling of a court where injury results, and there exists no right of appeal or other adequate means of redress.—*Ex parte Woodruff*, 123 Ala. 99; *Wilson v. Duncan*, 114 Ala. 659; *Ex parte Tower Man. Co.*, 103 Ala. 415; *Ex parte Hayes*, 92 Ala. 120.

To determine whether the ruling of the court be erroneous, and such as entitles the petitioner to this remedy, of necessity involves a consideration and review of the action of the court complained of in the petition. And if it be concluded upon such review and consideration that there is no error, the writ, as a matter of course, would be denied. The complainant had his bill dismissed, on application to the register in vacation, under the provisions of section 703 of the Code, which reads as

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follows: "Before an answer on cross-bill is filed, the complainant may, on application to the register in vacation, dismiss the suit. On such application, the register must enter on the minutes an order of dismissal; and may issue execution against the complainant for all costs which have accrued. After answer or cross-bill filed, the complainant may, on application to the register in vacation, dismiss the suit; and the register must enter an order of dismissal on the minutes. But the defendant, at the next succeeding term of the court, may show cause against the dismissal, and procure a vacation of the order. If cause is not shown at the next succeeding term, the order is final; and execution may issue against the complainant for all costs which have accrued." It was under the second clause of this statute that the dismissal was had. It is plain, that by the terms of the statute, the dismissal before the register does not become final, until upon failure of the defendant at the next succeeding term of the court to show cause against such dismissal. It is equally plain, that upon cause shown by the defendant against the dismissal at the next succeeding term of the court, the order of dismissal made by the register will be vacated. The cause shown against dismissal, must, of course, be a sufficient and good cause. The question is not whether the cross-bill contains independent equity, for if such were the case, the dismissal of the original, would not affect the cross-bill. Besides, by the terms of the statute, cause may be shown against the dismissal, after the filing of the cross-bill or answer. It was evidently the purpose of the legislature in authorizing the complainants to dismiss his suit in vacation, after answer or cross-bill had been filed, to guard against the dismissal of any suit that might operate prejudicially to the defendant, by providing for vacating the order of dismissal for cause shown at the next succeeding term. The present case affords a fair illustration of the wisdom of the provision in the statute. The original bill, answer and cross-bill are made a part of this petition for a *mandamus* as exhibits. The answer and cross-bill of the respondent show a set-off pleaded growing out of the subject matter contained in the original bill, and affirmative relief is prayed as to such set-off.

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The facts as averred in the answer and cross-bill further show that the demand sought to be set-off is of such nature and character, that any right of action on the same at law at the time of the dismissal of the suit before the register, would be barred by the statute of limitations, whereas the set-off claimed, was not barred when complainant began his suit against the respondent. It would result then that if the suit of the complainant were permitted to stand dismissed under the order of the register, the defendant would be barred of any action against the complainant, by the statute of limitations, for his demand claimed as a set-off in his answer and cross-bill. If there is any merit in his set-off, undoubtedly then, the dismissal by the complainant of his suit, would operate prejudicially to the rights of the defendant. As a general rule a plaintiff has a right to dismiss his suit, whenever he elects to do so. But this rule has its exceptions. It seems that a plaintiff may not as a matter right dismiss his suit when the respondent has acquired rights in the proceedings by answer or cross-bill, and would be prejudiced by such dismissal. See *City of Detroit v. Detroit City R'y Co.*, 55 Fed. Rep. 569; *Bank v. Rose*, 1 Rich. Eq. 294; 6 Ency. Pl. & Pr., p. 843, § 6, and notes where cases are collated. Although the chancellor based his ruling in ordering the cause reinstated on the docket, on the erroneous theory that the cross-bill contained independent equity, we are of the opinion that there was good cause shown for vacating the order of the register, and the order of the chancellor, that the cause be reinstated, was in effect the equivalent of such order. We do not think that the petitioner here, is entitled to the *mandamus* on the facts shown, and the same will be denied.

Mandamus denied.

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Action against Telegraph Company to recover Damages for Personal Injuries.

1. *Action against telegraph company for personal injuries; sufficiency of complaint.*—In an action against a telegraph company by one who was traveling along the public highway, to recover damages for personal injuries received as the result of a wire used by the defendant having fallen across the public road, where the complaint alleges that the team which was attached to the vehicle in which he was riding, came in contact with said wire, and by reason thereof became unmanageable and the plaintiff was thrown from the wagon and fell upon said wire and received the injuries complained of, and it was averred that the defendant owned and operated said telegraph wire which was heavily charged with electricity "and it became and was the duty of the defendant to use due care to have and keep said wire high up from said road, yet, notwithstanding said duty defendant negligently caused or allowed said wire to be or remain on, or such a short distance above, said public highway that the public traveling said highway were liable to be injured thereby," sufficiently charges a cause of action and is not subject to demurrer upon that ground, or upon the further ground that it fails to show the duty on the part of the defendant to keep its wire out of the way of travelers along the public road.
2. *Pleading and practice; when demurrer to special pleas properly sustained.*—Special pleas which set up matters simply in denial of the cause of action, as contained in the complaint, and interpose no ground of defense which can not be set up under the plea of the general issue, are subject to demurrer.
3. *Action against telegraph company; when negligence a question for the jury.*—In an action by one who was traveling along a public road against a telegraph company, to recover for personal injuries alleged to have been caused by reason of the defendant's negligence in allowing a wire charged with electricity to be or remain on or a short distance above the road, whereby the traveling public along said road were liable to be injured, and the defendant by special plea sets up

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that it exercised reasonable care to prevent its wires from becoming detached from its poles, and that it did not know and by the exercise of reasonable care could not have known that the wires had become detached from the pole, until after the injury to the plaintiff, and where the evidence for the plaintiff tends to show that at the point where the injury was alleged to have been caused the wire owned and operated by the defendant had become disengaged from the pole to which it was attached, by reason of the cross pole being rotten, and that the wire had been detached for two days or more before the injury complained of was inflicted, it is a question for the jury whether due care alleged had been proved, or whether due care had been exercised to discover and remedy the defective condition of the wire; and, therefore, the general affirmative charge requested by the defendant is properly refused.

4. *Same; same; charge to the jury.*—In such a case, a charge is properly refused which instructs the jury as follows: "That although the jury may find from the evidence that the cross arm which it appears from the evidence was detached from the pole at the point of defendant's line where the alleged injury occurred was rotten, or partially rotten, yet, in this case no recovery can be had because of such alleged rotten or partially rotten cross arm."
5. *Action for negligence; charge of court as to failure to call in physician.*—In an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, a charge is erroneous and properly refused which instructs the jury "that if they find from the evidence that no doctor was employed by the plaintiff to treat his alleged injuries, the jury may look to this fact, if found from the evidence to be a fact, as a circumstance tending to show that plaintiff was not seriously hurt at the time and place named in the complaint and evidence."
6. *Action to recover for personal injuries; admissibility of evidence.* In an action to recover damages for personal injuries, where there was evidence tending to show that the plaintiff continued to suffer more or less from the injury ever since it was received, it is competent to ask a witness who was shown to have been with the plaintiff, as to whether or not he had heard the plaintiff give expressions of pain or suffering since he received the injuries complained of.
7. *Action against telegraph company; inconsistency of court in rulings upon charges requested by defendant.*—In an action by one who was traveling along a public road against a

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telegraph company, to recover for personal injuries alleged to have been caused by reason of the defendant's negligence in allowing a wire charged with electricity to be or remain on or a short distance above the road, whereby the traveling public along said road were liable to be injured, there is no inconsistency on the part of the trial court in giving a charge at the request of the defendant which left the jury free to find that the wires, poles and cross arms of defendant's line were not in safe and good condition when they were last inspected, and upon so finding to return a verdict for the plaintiff, and refusing at the request of the defendant the general affirmative charge in its behalf.

8. *Trial and its incidents; new trial can not be granted because court gave charge at the request of movant.*—Where in the trial of a cause, there is judgment rendered for the plaintiff, it constitutes no ground for the granting of a new trial, that the court at the request of the defendant gave a charge in its behalf.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. A. A. COLEMAN.

This was an action brought by the appellee, C. A. Jones, against the Postal Telegraph Cable Company to recover damages for personal injuries received by him while travelling along a public highway, by the side of which the defendant had its wires strung.

The complaint as amended contained but one count. In this count the plaintiff alleged that on November 5, 1898, the defendant owned and operated a line of telegraph wire which was attached to poles along or near the public highway in Jefferson county; that said line of telegraph wire was heavily charged with electricity, "and it became and was the duty of defendant to use due care to have and keep said wire high up from said road, yet notwithstanding said duty defendant negligently caused or allowed said wire to be or remain on, or such a short distance above, said public highway, that the public traveling said highway were liable to be injured thereby." It was then averred that on the day above named the plaintiff was traveling along said highway in a wagon to which a team was attached, and that said team came in contact with the said wire and as a proximate consequence thereof the team became unmanageable and plaintiff was thrown from the wagon,

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and came in contact with the wire charged with electricity, and sustained the damages complained of. The plaintiff claimed \$500 as damages.

To this complaint the defendant demurred upon the following grounds: 1. It fails to aver any duty that the defendant owed to the plaintiff in the manner of maintaining its wires. 2. That the complaint fails to show that the defendant did not discharge its duty to the plaintiff. 3. The complaint fails to show with reasonable certainty in what the alleged negligence of the defendant consisted. 4. It fails to aver what, if any, negligence on the part of the defendant contributed proximately to plaintiff's alleged injuries. This demurrer was overruled. Thereupon the plaintiff filed the pleas of the general issue and the following special pleas: "4. For further answer to the complaint the defendant says and avers that the plaintiff ought not to have and recover any sum of this defendant in this cause because, as it avers, neither the defendant nor the employees of defendant, whose duty it was to see that its wires at the point named in the complaint were properly attached to the poles, knew that said wires were detached from said poles in the manner stated in the complaint until after the alleged injury to plaintiff, when, as defendant avers, the defendant within a reasonable time thereafter caused said wires to be properly attached to said poles."

"5. For answer to the complaint the defendant says and avers that the plaintiff ought not to have and recover any sum of this defendant in this cause because, as it avers, neither the defendant nor the employees of the defendant, whose duty it was to see that its wires at the point named in this complaint were properly attached to the poles, knew, or by the exercise of reasonable care would have known, that said wires were detached from said poles in the manner stated in the complaint until after the alleged injury to plaintiff, when, as defendant avers, the defendant within a reasonable time thereafter, caused said wires to be properly attached to said poles."

"6. For further plea in this behalf the defendant says and avers that plaintiff ought not to have and recover

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of this defendant any sum because it says and avers that the plaintiff contributed to his own injury in this, that knowing the wire referred to in the complaint was alongside of the alleged road, he, without due care, drove or allowed to be driven the alleged team against said wire, thereby contributing to his alleged injuries."

"7. For further answer to the complaint the defendant says and avers that the plaintiff ought not to have and recover any sum of this defendant in this cause because, as it avers, that the defendant exercised reasonable care to prevent its said wires from becoming detached from its said poles, and that neither the defendant or the employees of the defendant, whose duty it was to see that its wires at the point named in this complaint were properly attached to the poles, knew, or by the exercise of reasonable care would have known, that said wires were detached from said poles in the manner stated in the complaint until after the alleged injury to plaintiff, when, as defendant avers, the defendant within a reasonable time thereafter caused said wires to be properly attached to said poles."

To pleas 4 and 5 the plaintiff demurred upon the following grounds: 1. Said pleas do not interpose any defense which could not be set up under the plea of the general issue; and the facts averred in said pleas can be given in evidence under the general issue. 2. Said pleas fail to negative the negligence of the defendant in allowing the wire to be along or near the public road. The demurrer to each of these pleas was sustained. The judgment entry recites that there was a motion made to strike the 7th plea from the file. The grounds of this motion are not shown. Said motion, however, was overruled.

On the trial of the cause upon issue joined upon the remaining pleas, it was shown that on the night of November 5, 1898, the plaintiff in company with two other men was riding along a public road in Jefferson county in a wagon drawn by a horse and a mule; that when they were about thirteen miles from the city of Birmingham the team came in contact with a wire which was swinging about two feet from the ground in the

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middle of said road; that this wire was charged with electricity and the shock therefrom caused the team to rear and charge; that the wagon was broken, the occupants thereof thrown out, and the plaintiff fell on the wire and the body of the wagon fell upon him; that this wire was owned, operated and maintained by the defendant.

The evidence for the plaintiff tended to show that on the day before, while plaintiff and his companions were going along the same road in the direction of Birmingham the defendant's wire at the point on the road where the injury had occurred, had dropped from the cross arm of the post from which it was suspended, and was propped out of the road with a forked stick; that the cross arm by which the said wire was suspended from the post, was rotten and broken.

The evidence for the plaintiff further tended to show that the plaintiff's injuries were permanent in their character, and that the plaintiff had suffered a great deal and was rendered less able to work.

During the examination of one Lawler, who was with the plaintiff at the time of the accident, he was asked the following question: "Have you or not heard Jones, the plaintiff, give expressions of pain or suffering since that night?" To this question the defendant objected. The court overruled the objection, and the defendant duly excepted.

The defendant, as a witness in his own behalf, testified in detail to the injuries sustained by him, and further testified that he did not have a doctor to attend him.

The evidence for the defendant tended to show that the line along which the wire was running was maintained in good condition, and was of such material as was in use in well regulated telegraph lines; that said line had been inspected by a competent lineman on October 14, 1898, just a short time before the accident, and that it was then found to be in good condition.

One of the witnesses for the defendant, and who testified that he was the wire chief of the defendant, whose place of business was in Birmingham, further testified that by a system used by the defendant the wire chief

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could tell as soon as a wire was obstructed, and was enabled by the use of an instrument called a galvanometer to approximate the distance from the office in Birmingham to the place of obstruction; that up to the time this witness went off duty at 4 o'clock November 5, 1898, nothing had interrupted the wire along the line where the accident occurred. Another witness, who testified that he was the night wire chief, testified that about 9 o'clock on the night of November 5, 1898, the instrument referred to indicated that there was an obstruction along the road on which the plaintiff was injured, about thirteen miles from Birmingham. The evidence for the defendant further tended to show that the next morning a line man was sent to the place in question and found that the wire had dropped from the post, but was propped up from the road by a forked stick. Two of the witnesses introduced for the defendant testified that the cross arm on which the wire was suspended from the post was not rotten or broken.

The evidence for the defendant further tended to show that the current of electricity along the wire which was alleged to have caused the injury complained of was not of sufficient force to be dangerous.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked:

- (1.) "The court charges the jury that if the jury believe the evidence introduced in behalf of the defendant, they must find for the Postal Telegraph Cable Co."
- (2.) "The court charges the jury that if they believe the evidence, they must find a verdict in favor of the defendant, the Postal Telegraph Cable Co."
- (3.) "The court charges the jury that although the jury may find from the evidence that the cross arm which it appears from the evidence was detached from the pole at the point of defendant's line where the alleged injury occurred was rotten, or partially rotten, yet, in this case, no recovery can be had because of such alleged rotten cross arm."
- (4.) "The court charges the jury that if they find from the evidence that no doctor was employed by the plaintiff to treat his alleged injuries, the jury may look to this fact, if found from the evidence to

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be a fact, as a circumstance tending to show that plaintiff was not seriously hurt at the time and place named in the complaint and evidence."

The court, at the request of the defendant, gave to the jury, among others, the following written charge: (10.) "The court charges the jury that if they believe from the evidence that it is the custom of well regulated telegraph companies to inspect the lines of such companies once a month; and if the jury further find from the evidence that the line which included the point where the alleged injury occurred had been inspected by a competent man on the 13th of October, 1898, and if the jury further find from the evidence that at the time of said inspection, provided they find there was such inspection by such man, the wires, poles and cross arms were in good and safe condition and such as were and are used by well regulated telegraph companies and if the jury further find that the defendant, the telegraph company, did not know the line was down until or after the alleged injury to plaintiff and that it was repaired the next morning, and if the jury further find from the evidence that the defendant used the ordinary and usual and reasonable care of well regulated telegraph companies in ascertaining whether the line in question was down, then the verdict should be for the defendant, the Postal Telegraph Company."

There were verdict and judgment in favor of the plaintiff, assessing his damages at \$250. After the rendition of this judgment the defendant moved the court to set aside the verdict and judgment and grant a new trial upon the ground that the court erred in refusing to give the several charges requested by the defendant, because the verdict was contrary to the law and the evidence; because the court erred in its ruling upon the pleadings, and upon the following ground: "8. The court by giving to the jury charge No. 10 at the request of defendant held on the evidence that the plaintiff was not entitled to recover yet refused to give charge No. 2, which respective actions of the court operated to the injury of the defendant on the trial and will operate to injury of the defendant on appeal." This motion was overruled, and the defendant duly excepted.

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The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

J. J. ALTMAN, for appellant.

BOWMAN & HARSH, *contra*.—The court did not err in its rulings upon the pleadings.—*L. & N. R. R. Co. v. Marbury L. Co.*, 125 Ala. 237; *L. & N. R. R. Co. v. Jones*, 83 Ala. 376; *Laughran v. Brewer*, 113 Ala. 515.

Demurrers to the fourth and fifth pleas are plainly well taken. These two pleas are but the efforts to make up a defense out of some but not all of the materials in the general issue. In other words, they negative only a part of the negligence alleged. For duty of defendant in reference to wires across highways, see *Newark Elec. L. & P. Co. v. Ruddy*, 5 Am. Neg. Rep. 402; *Lloyd v. City & Suburban Ry.*, 7 Am. Neg. Rep. 591; *Keasbey on Electric Wires* (2d ed.), §§ 227 and 231; *Dickey v. Maine Tel. Co.*, 46 Me. 483; *Thomas v. Western Union Tel. Co.*, 100 Mass. 156; *Penn. Telephone Co. v. Varman*, 15 Atl. Rep. 624; *Nichols v. City of Minneapolis et al.*, 33 Minn. 430; *Chatta. Elec. Co. v. Mingle*, 56 S. W. Rep. 23.

The charge requested by the defendant was properly refused. If a sound cross arm is one of the appliances used by defendant to hold its wires out of the highway, then having a rotten and ineffective cross arm was one way of causing or allowing the wire to be in the highway and is fully covered by the complaint. The *quo modo* of defendant's negligence is not necessary to be stated.—*L. & N. R. R. Co. v. Jones*, 83 Ala. 376; *Rowe v. N. Y. & N. J. Tel. Co.*, 9 Am. Neg. Rep. 528; *Leach et al. v. Bush et al.*, 57 Ala. 154; *Mary Lee Coal & Ry. Co. v. Chambliss*, 92 Ala. 172; *L. & N. R. R. Co. v. Hawkins*, 92 Ala. 243; *L. & N. R. R. Co. v. Mothershed*, 12 So. Rep. 714.

McCLELLAN, C. J.—There is no merit in the contention for appellant that the complaint did not aver the negligence counted on with sufficient particularity. The rule is that the duty to exercise care being shown, the failure to perform that duty, the negligence causing

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the injuries complained of may be well averred in the most general terms, little if at all short of the mere conclusions of the pleader; and this upon the entirely sufficient consideration, among others, that if the defendant has been guilty of negligence he knows as well as or better than the plaintiff can in what that negligence consisted.—*Louisville & Nashville Railroad Co. v. Jones*, 83 Ala. 376; *Louisville & Nashville Railroad Co. v. Marbury Lumber Co.*, 125 Ala. 237; *Mobile & Ohio Railroad Co. v. George*, 94 Ala. 214; *Bessemer Land & Imp't Co. v. Campbell*, 121 Ala. 50; *Montgomery Street Railroad Co. v. Armstrong*, 123 Ala. 233; *Ga. Pac. R'y Co. v. Davis*, 92 Ala. 307; *Stanton v. Louisville & Nashville Railroad Co.*, 91 Ala. 384; *Ensley Railroad Co. v. Cheurning*, 93 Ala. 26; *Laughran v. Brewer*, 113 Ala. 509; *Louisville & Nashville Railroad Co. v. Orr*, 121 Ala. 489; *Memphis & Charleston Railroad Co. v. Martin*, 117 Ala. 367, and many other cases.

The objection taken by demurrer that the complaint does not sufficiently show a duty on the part of the defendant to keep its wires out of the way of travelers along public roads is too palpably unfounded to require discussion. The complaint does aver such duty, and the courts take cognizance of it even without averment. In this respect the case is analogous to that of *Louisville & Nashville Railroad Co. v. Marbury Lumber Co.*, *supra*, in which the complaint averred that the defendant negligently set fire to and burned plaintiff's cotton. We know in this case that it was defendant's duty to exercise care to avoid obstructing public roads, as we knew in that it was defendant's duty to exercise care to avoid burning plaintiff's cotton.

All the facts averred in pleas 4, 5 and 7 were provable under the general issue: The averments of these pleas were mere denials of negligence; and on this ground the appellant can take nothing by reason of the court having sustained the demurrer to those numbered 4 and 5. Both those and plea 7 might well have been stricken on the ground referred to.

Plea 7 was allowed to remain in the case, however, and appellant's counsel insist that it was proved on the trial. We do not find that it was proved. The plea

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alleges that the defendant used due care to prevent its wires from becoming detached from its poles. The evidence for plaintiff was that the wires at the point they fell and obstructed the highway had been attached to the pole from which they became disengaged, by means of a rotten cross bar, etc. On this evidence it was clearly a question for the jury whether the due care alleged had been proved. The plea also alleges that the defendant did not know and by the exercise of reasonable care could not have known that the wires had become detached from the pole until after the injury to plaintiff, but the evidence for the plaintiff showed that the wires had been detached for more than two days before the injury was inflicted, and it was open to the jury to say upon this evidence that due care had not been exercised to discover and remedy the defective condition of the wires. Something is said in the case about an instrument in use in defendant's offices by the use of which trouble with the wires may be detected and located. We do not understand that this instrument will indicate the detachment of a wire from a pole and its consequent suspension in the way of travelers across a public road, or will indicate anything at all so long as the current of electricity carried by the wire is not obstructed. It indicated nothing in this case until the current was diverted from the wire in consequence of plaintiff's wagon and team and person coming in contact with it. The evidence about this instrument cuts no figure in respect of the injury whether defendant was negligent in allowing the wires to become detached from the pole and sag into the highway for two or three days.

What we have said in respect of the complaint applies to the third charge requested by defendant. On the evidence the jury were fully warranted in finding that the cross arm was rotten, that it was so rotten, or, being rotten, was used by defendant in consequence of its, defendant's, negligence, and that such negligence in respect of the cross arm was the efficient cause of plaintiff's injury, entitling him to a verdict.

There being not only the evidence as to the rottenness of the cross arm from which damning negligence was inferable by the jury; but also evidence that the

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wires had been down two or more days before the injury from which it was open to the jury to infer such negligence, and there being also evidence of the alleged injury, it requires no argument to demonstrate that the affirmative charge requested by defendant was properly refused.

It becomes necessary to remark only, because the contrary is insisted upon, that a charge to the jury "that if they find from the evidence that no doctor was employed by the plaintiff to treat his alleged injuries, the jury may look to this fact, if found from the evidence to be a fact, as a circumstance tending to show that the plaintiff was not seriously hurt," is such a singling out and giving undue prominence to a part of the evidence as is unwarranted and has been over and over again condemned by this court.

The evidence tended to show that the plaintiff had continued to suffer more or less from the injury ever since it was received. The question to the witness Lawler: "Have you not heard the plaintiff give expressions of pain and suffering since that night," covered the time under inquiry, and was not objectionable.

There was no inconsistency on the part of the circuit court in giving charge 10 for defendant and refusing the general charge asked by defendant. The jury were left free by this 10th charge to find that the wires, poles and cross arms of defendant's line were not in good and safe condition when Worthy last inspected the line, and upon that to return a verdict for the plaintiff, while all this would have been denied them by the affirmative charge. This matter is made a ground of the motion for a new trial, and is the only ground on that motion specially insisted upon by counsel. The contention in this connection is not that the court should have granted a new trial for having erroneously refused to give the general charge for defendant—that is another ground of the motion—but that a new trial should be granted to defendant because the court gave charge 10 at its request. We confess we do not see how the defendant can ask a new trial on the ground that the court in a specified instance ruled at his request in his favor.

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We do not understand that any of the other grounds of the motion for a new trial, except such as we have above considered apart from that motion, are insisted on. Whether so or not, they are without merit.

Affirmed.

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Statutory Action of Ejectment.

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1. *Deed; construction thereof; estates created.*—A deed whereby the owner of real and personal property conveyed it to a designated person in trust for the use of his son M. for life, and at his death “for the use and benefit of the heirs of M. at the time of his death and their heirs and assigns forever. But in case he shall leave no heir or heirs living at the time of his death, then and in that case the same real and personal estate shall go to the heirs at law of the said” grantor, “living at the time of the death of the said M. and to be distributed according to the laws of the State of Alabama for the distribution of intestate estates,” and it is apparent from the instrument itself and from the situation and circumstances of the parties that it was written by a person unacquainted with the use of legal technical words, and that the word heirs used in the first limitation meant children, issue or descendants of M. living at his death; such deed vested in M. a life estate with remainder to his children living at his death.

APPEAL from the Circuit Court of Tuscaloosa.

Tried before the Hon. S. H. SPROTT.

This was a statutory action of ejectment brought by the appellants against the appellees. The facts of the case are sufficiently stated in the opinion.

From a judgment in favor of the defendants the plaintiffs appeal, and assign as error the giving of the general charge requested by the defendant.

H. B. FOSTER and FOSTER & OLIVER, for appellants.
(No briefs came to the hands of the Reporter.)

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DANIEL COLLIER and HENRY A. JONES, *contra*, cited *Martin v. McRae*, 30 Ala. 116; *Smith v. Greer*, 88 Ala. 414; *Slayton v. Blount*, 93 Ala. 576; *Wilson v. Alston*, 122 Ala. 636.

TYSON, J.—This is an action of ejectment to recover a certain tract of land described in the complaint, brought by the children of Murchison Findley, who died on the 16th day of March, 1900. The defendants claim title under warranty deeds executed by Murchison in 1836 under which they, and those through whom they hold, have been continuously in possession of the lands claiming them adversely.

It appears that one Kenneth Findley being the owner of these lands, in 1826, conveyed them to his son John in trust for the use of his infant son, Murchison, then some fourteen years old, for life and at his death, "for the use and benefit of the heirs of Murchison Findley at the time of his death and their heirs and assigns forever. But in case he shall leave no heir or heirs living at the time of his death, then in that case the same real and personal estate shall go to the heirs at law of the said Kenneth Findley living at the time of the death of the said Murchison Findley and to be distributed according to the laws of the State of Alabama for distribution of intestate estates."

John Findley, the trustee, lived near the lands until his death in 1894. Kenneth Findley, the grantor and father of John and Murchison, had other children living at the date of the deed to John. The oldest child of Murchison was forty-eight years of age at the commencement of the suit. On the foregoing state of facts the trial court, at the request of the defendants in writing, gave the general affirmative charge in their favor.

If the deed to John created a fee in Murchison, or if it created an estate tail in him, or if the statute of limitations operated to effect a bar against the estate limited to the plaintiffs, of course, they have no right to recover and the instruction to the jury was proper. If, however, the estate was limited to the children or issue of Murchison, the statute of limitations would not bar the rights of the plaintiffs, because the convey-

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ance to John was a dry use, which under the statute of uses passed the legal title to Murchison for life, in all respects as if the deed had been made without the intervention of a trustee.—*You v. Flinn*, 34 Ala. 409; *Gindrat v. W. R. of Ala.*, 96 Ala. 162; *Webb v. Crawford*, 77 Ala. 440. In such case, the remainders over to the unborn children of Murchison, and in default of such living at his death, to the heirs of the grantor living at the death of the life tenant, whether vested or contingent, would await the termination of the life estate, unaffected by the conveyance and warranty of Murchison, the remaindermen being without right or power to disturb the estate created by the deed of the life tenant.—Tiedeman on Real Property, § 481; *Pope v. Pickett*, 65 Ala. 491; *Pickett v. Pope*, 74 Ala. 122; *Bass v. Bass*, 88 Ala. 408; *Allen v. De Groodt*, 14 Am. St. Rep. 626 and note on page 635; *McCorry v. King's Heirs*, 39 Am. St. Rep. 165.

So, then, the only question in this case is, what was the effect of the limitation over upon the death of Murchison. In determining the intention of the grantor we may look not only to the words used, but the situation and circumstances of the parties, the context of the instrument and the fact, if it exists, that it was written by a person unacquainted with the use of legal technical words. In this case we have a father, with a number of living children, making provision for his minor son, and to that end, giving him an estate expressly for life with remainder for the use of his "heirs at the time of his death and their heirs and assigns forever," and, in default of "heir or heirs living at the time of his death" over to the heirs of the grantor living at the death of the life tenant and to be (then) distributed according to the law for the distribution of intestate estates. Now, looking first at the second limitation, there can be no doubt that by it the estate would vest in the persons answering to the description of "heirs" of Kenneth Findley, the grantor, living at the death of Murchison, the life tenant.—*Roberts v. Oghourne*, 37 Ala. 174. These persons, however, would be also the heirs of Murchison, if he had died without descendants. To hold then that the first limitation,

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upon the death of Murchison, is to the heirs general of the life tenant would make the second limitation over to the same persons as living. It is impossible to suppose that any grantor would intend such a result. It is certain, then, that the first limitation to the heir or heirs of Murchison living at his death, was not and could not have been intended for the same persons as the second limitation. This being true, the only other meaning open for our adoption is, that the first limitation was to the children, issue or descendants of Murchison living at his death. Adopting this construction, the deed is congruous in all its parts.

While it is true that courts will respect and enforce the technical meaning of "heirs" or "heirs of the body," so as to make them strict words of limitation, after a life estate to the ancestor, where there is nothing to show that they are not used in a different sense, there is a disposition, especially since the abolition of estates tail, to seize upon slight circumstances to make them words of purchase.—*May v. Ritchie*, 65 Ala. 602; *Price v. Price*, 5 Ala. 581; *Williams v. McConico*, 36 Ala. 22; *Dunn v. Davis*, 12 Ala. 140; *Watson v. Williamson*, 129 Ala. 362. The fact that the successive limitations over on the death of Murchison would be limitations to the same persons as both dead and living when the words are given a technical meaning, shows that the deed was written by a person unskilled in the use of technical words and that the grantor must have used "heir or heirs" in the first limitation in the narrower sense of children, issue or descendants.—*Bell v. Hogan*, 1 Stew. 539; *Twelves v. Nevill*, 39 Ala. 175; *Campbell v. Noble*, 110 Ala. 382; *May v. Ritchie*, *supra*; *Williams v. McConico*, *supra*; *Roberts v. Ogbourne*, *supra*; 15 Am. & Eng. Ency. Law (2d ed.), 324.

There is another circumstance which adds force to this construction. The conveyance was of real and personal property consisting of "slaves," "horses," "hogs" and "one set of carpenter's tools." A limitation of personal property over on indefinite failure of issue is void at the common law.—1 Brick. Dig., 786, § 9.

It is entirely clear that the grantor did intend to make a limitation over, after the life estate, but he could

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not have intended, both from the nature of some of the property and the prohibition of the law, to limit the personal property after an indefinite failure of issue. And as the real and personal estate is limited by the same clause, the courts are disposed, the more readily, to infer an intent to limit on a definite failure of issue. *Bell v. Hogan supra*; *Alford v. Alford*, 56 Ala. 350; 2 Jarman on Wills, Ch. XL, I.

In this case the clause in the deed prescribes, that the first limitation on the death of Murchison, shall be an absolute fee in the "heir or heirs" of Murchison, "living at the time" of his death, and in default of such living person to take, over (in fee) to the persons answering to the description of heirs of the grantor at that time. There is no room for saying that there was the least purpose to make a limitation upon indefinite failure of issue. The definite time fixed for division and for the vesting of a fee in any event is the death of Murchison. No estate tail, therefore, is limited, since the purpose in such case is a limitation upon indefinite failure of issue and not to a particular person or a particular class of persons. Here, a person claiming as a remainderman would have to show not only that he was an "heir" of Murchison, but by the express words of the deed that he was living at his (Murchison's) death, which excludes the idea of the creation of estates tail—an indefinite failure of issue.—*Roberts v. Ogbourne, supra*; *Fearne on Rem.*, 199.

It follows that, under the deed, Murchison took a life estate with remainder to his children living at his death and consequently the plaintiffs are entitled to recover.

Reversed and remanded.

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Action upon Attachment Bond.

1. *Pleading and practice; how motion considered on appeal; bill of exceptions.*—The ruling of the trial court upon a motion to require the plaintiff to pay certain costs as a condition to

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the further prosecution of his action will not be reviewed on appeal, unless the motion is incorporated in the bill of exceptions; and it is not sufficient for the presentation of the rulings upon such motion that a copy thereof appears as a part of the record in the transcript.

2. *Action on an attachment bond; admissibility of evidence.*—In an action upon an attachment bond, where it is shown that the writ of attachment was not in the file and was lost, it is competent for the plaintiff to introduce in evidence the motions made by the defendants in the attachment suit to substitute the writ of attachment and for a writ of *venditioni exponas* directing the sheriff to sell the property levied upon as shown by his return on the attachment writ.
3. *Same; secondary evidence.*—In an action upon an attachment bond, where evidence is introduced that the writ of *venditioni exponas*, issued under an order of the court directing the sale of the property levied upon under a writ of attachment, was not in the file of papers in the case, and could not be found after diligent search by the clerk and sheriff in the places where such papers were usually kept, and could not be found in the office of either of such officers, secondary evidence of the contents of such *venditioni exponas* and of its execution, is admissible in evidence.
4. *Evidence; general objections properly overruled.*—Where a portion of the testimony to which a general objection is interposed is competent and admissible in evidence, such general objection is properly overruled.
5. *Action upon attachment bond; plea of set off; when judgment exorbitant.*—In an action upon an attachment bond, where the defendants file a plea of set off, and the evidence shows an indebtedness from the plaintiff to the defendant to the extent of \$275.22, and the actual damages shown by the plaintiff's testimony to have been sustained by him on account of the wrongful suing out of the attachment amounts to \$366.90, a verdict of the jury assessing the plaintiff's damages at \$258.38 is exorbitant; and constitutes a ground for the granting of a new trial.

APPEAL from the Circuit Court of St. Clair.

Tried before the Hon. JOHN PELHAM.

This was an action brought by the appellant, M. L. Maxwell, against Newton O. Hamilton and J. W. Hamilton. The complaint counted upon the breach of an attachment bond and sought to recover damages for the wrongful suing out of an attachment by the defendants

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who executed the attachment bond sued on. The defendants moved the court to require the plaintiffs to pay the costs which had accrued on the former appeal in this cause, which had been decided by the Supreme Court against the present plaintiff, and that the plaintiff be required to reimburse the defendants for the payment of said costs which they had been compelled to pay before the plaintiff be allowed to further proceed in this suit. This motion appears as a part of the record copied in the transcript and is not shown by the bill of exceptions, and there is no evidence relating to said motion shown in the transcript. This motion was overruled. The defendants pleaded the general issue and several pleas of set-off, in which they claimed that the plaintiff was indebted to them in the sum of \$275.22. Upon issue joined upon these pleas the trial was had.

Upon the trial the plaintiff offered in evidence the bond sued on. It being shown to the court that there was no writ of attachment on file, purporting to have been issued under deed by virtue of the attachment bond, the plaintiff offered in evidence a motion made by the defendant, N. O. Hamilton, as plaintiff in the original attachment suit, in which he asked for an order allowing the plaintiff in said attachment suit to substitute the original attachment writ issued by the justice of the peace before whom the attachment was sued out and made returnable to the circuit court in favor of N. O. Hamilton and J. W. Hamilton against the plaintiff in the present suit. The plaintiff then offered in evidence the motion made by the defendant in said attachment suit in which he asked that the sheriff be ordered to take into his possession and sell the personal property which had been levied upon under the writ of attachment sued on by him against the plaintiff in the present suit. The defendants objected to the introduction in evidence of this motion upon the following grounds: 1. That it was illegal and incompetent evidence. 2. It was not shown that any writ of attachment was ever issued by virtue of said attachment bond. 3. It was not shown that said motion pertained to the same matter of objection as was expressed in said bond. The court overruled this objec-

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tion, permitted the motion to be introduced in evidence, and to this ruling the defendants duly excepted. Thereupon the plaintiff offered in evidence the judgment entry of the court upon said motion asking for the sale of the property. This judgment ordered that the *venditioni exponas* be issued. The defendants objected to the introduction of this judgment entry upon the same grounds interposed to the introduction of the motion. The court overruled the motion, and the defendants duly excepted. It was then shown to the court that there was no writ of *venditioni exponas* or other appropriate writ on file purporting to have been issued by virtue of or in compliance with the mandate of said judgment, and that if any such writ had been issued it was lost and could not be found after diligence search therefor. The plaintiff introduced the clerk of the circuit court, the deputy clerk and the sheriff of the court, each of whom testified that they had made diligent search for the writ of *venditioni exponas* issued upon said judgment in the places where such papers were usually kept and where they would expect to find them, and that after such diligent search they had been unable to find them. The sheriff of said county testified to the fact that the writ of *venditioni exponas* in favor of the defendant N. O. Hamilton and against the plaintiff in the present suit was issued out of the circuit court and was delivered to him for execution, and that under said writ he had made a sale of the property as ordered. He also testified substantially to the contents of said writ of *venditioni exponas*. Defendants moved to exclude from the jury the evidence of the witness and the sheriff relating to his having taken possession and sale of the property of the plaintiff under the writ of *venditioni exponas* upon the grounds: 1. That it was not shown that said writ was in any way connected with or grew out of the attachment suit mentioned in the attachment bond sued on. 2. Because such testimony was illegal and incompetent. The court overruled the objection, and the defendant duly excepted.

The plaintiff, as a witness in his own behalf, testified that prior to the levy of the writ of attachment he

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was engaged in the saw mill business; that on the morning of August 27, 1894, he was operating a saw mill when N. O. Hamilton, one of the plaintiffs, from whom he rented said saw mill, came to the plaintiff's place of business and demanded the payment of the rent; that he told Hamilton that he did not have the money, but would pay him in lumber; that Hamilton agreed to take the lumber, but that they could not agree as to the value of said lumber, and that thereupon it was agreed between them that it should be left to two persons to decide the value. The defendant objected to all of this testimony of the plaintiff upon the ground that it was illegal and incompetent and irrelevant. The court overruled the objection, and the defendant duly excepted. The plaintiff then introduced evidence tending to show the levy of the attachment upon this property and that there was no ground for the levy as set forth in the affidavit, which recited that the plaintiff was fraudulently disposing of his property. The defendant introduced evidence tending to show that there was some ground for the defendant believing that the plaintiff was disposing of his property other than in the regular course of business. The defendant also introduced other evidence tending to support the pleas of set-off. The evidence relating to the pleas of set-off are sufficiently stated in the opinion.

The defendant requested the court to give to the jury the several written charges, among which was the general affirmative charge in favor of the defendants. The court refused to give each of these charges, and the defendants separately excepted. The opinion on the present appeal renders it unnecessary to set out the facts in detail. The jury returned a verdict in favor of the plaintiff, assessing his damages at \$258.38 and judgment was rendered accordingly. The defendants made a motion for a new trial, upon the grounds that the verdict of the jury was contrary to the law and the evidence and upon the further ground that the verdict of the jury was exorbitant. This motion was overruled, and the defendants duly excepted. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

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M. M. SMITH, for appellant.—The motion to require the plaintiff to pay the costs as a condition for the further prosecution of the suit should have been sustained. *Hamilton v. Maxwell*, 119 Ala. 23; *Ex parte Street*, 106 Ala. 102; *Ex parte Spear*, 92 Ala. 596; 23 Am. & Eng. Ency. Law, 527-8.

The rulings of the court upon the evidence were erroneous.—*Reynolds v. McClure*, 13 Ala. 159; *Galbreath v. Cole*, 61 Ala. 139; *Thresh v. Bennett*, 57 Ala. 156; *Flournoy v. Lyon & Co.*, 70 Ala. 308; *Wharton v. Cunningham*, 46 Ala. 590; *Trammell v. Hudson*, 56 Ala. 235.

The damages assessed by the jury were exorbitant, and for that reason the defendant's motion for a new trial should have been granted.—*Hall v. Hall*, 47 Ala. 290; *Johnson v. Martin*, 54 Ala. 271; *Carter v. Shorter*, 57 Ala. 253; *Davidson v. State*, 63 Ala. 432; *S. & N. R. R. Co. v. McClendon*, 63 Ala. 266.

JAMES A. EMBRY, *contra*, cited *Hamilton v. Maxwell*, 119 Ala. 23; *Ex parte Street*, 106 Ala. 102; *Ex parte Spear*, 92 Ala. 596; 3 Brick. Dig., § 20; *Very v. Watkins*, 25 How. 469; *Baucum v. George*, 65 Ala. 250.

TYSON, J.—The motion to require the plaintiff to pay certain costs as a condition to a further prosecution of his action is not incorporated in the bill of exceptions. The action of the court thereon is not, therefore, revisable.—*Ewing v. Wofford*, 122 Ala. 439, and authorities cited. Besides the record fails to set out the evidence introduced in support of the motion, if any was introduced. So if the motion appeared in the bill of exceptions, with no proof of the facts alleged in it appearing in the record, we would be compelled to sustain the rulings of the court overruling it.

The trial court committed no error in refusing to exclude the motion of defendants made in the attachment suit to substitute the writ of attachment and for a writ of *venditioni exponas* directing the sheriff to sell the property levied upon as shown by the writ of attachment; nor in refusing to exclude the order of the

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court thereon. These records were clearly competent to show the recognition by defendants of the validity of the levy of the writ of attachment by the constable and to preclude them from attacking it for invalidity. Having represented to the court by motion that the attachment had been levied and having procured from the court an order of sale for the property, they cannot be allowed to avail themselves of the invalidity of that levy.—*Hamilton v. Maxwell*, 119 Ala. 26.

We are clearly of the opinion that a sufficient predicate was laid for the introduction of secondary evidence of the contents of the *venditioni exponas* and of its levy. Nor was there any merit in the objection that the writ of *venditioni exponas* is not shown to have been in any way connected with or to have grown out of the attachment suit. On this point we need only refer to the fact that the affidavit for the writ of attachment and the bond upon which the suit is brought, both bear date August 27th, 1894, and show that the writ was issued by E. E. Clayton, J. P., returnable to the Fall term, 1894, of the circuit court of St. Clair county, which facts are also shown by the motion and the order of the court thereon granting the writ of *venditioni exponas*.

We are unable to determine from the objection and motion what portion of Maxwell's testimony was objected to. Clearly a part of it was entirely competent. The court below was under no duty to separate the legal or competent from illegal or incompetent, and the objection, failing in this respect, was properly overruled.

On former appeal in this case (*Hamilton v. Maxwell, supra*), it was held that no exemplary, vindictive or punitive damages are recoverable under the complaint. So, then, the plaintiff can, of course, recover only actual damages. The defendants filed a plea of set-off, upon which issue was taken and the evidence without conflict supports the plea to the extent of \$275.22. The actual damages shown by plaintiff's testimony to have been sustained by him, amounts to \$366.90, about which there is a serious dispute in the evidence. The verdict of the jury assessed the plaintiff's damages at

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\$258.38. The motion for a new trial, the overruling of which is assigned as error, should have been granted upon the ground assigned in it, that the damages assessed by the jury were exorbitant.

We do not wish to be understood as committing ourselves to the meritoriousness of the defendant's plea of set-off.—*Hundley v. Chadick*, 109 Ala. 575; *Painter v. Munn*, 117 Ala. 322. We express no opinion on that point. It is not raised, since the plea was made material by issue having been taken upon it. We also entertain the opinion that whether the attachment was wrongfully sued out was a question of fact for the determination of the jury. The general affirmative charge requested by defendants was properly refused.

Reversed and remanded.

DOWDELL and SHARPE, JJ.—If what is said in the opinion is to be construed as intimating that the plea of set-off is not a proper one in this action we wish to be understood as not concurring in such intimation. The question not being raised, any expression of opinion concerning the merits or demerits of the plea would be mere *dictum*.

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Petition in Pending Suit in Equity by Third Person to be allowed to intervene as a Creditor.

1. *Petition for intervention; decree sustaining demurrers thereto will not support appeal.*—Where a petition is filed in a pending suit in equity by a third person in which he asks to be allowed to intervene in said suit, and upon demurrers interposed to such petition the chancellor renders a decree sustaining them, but does not dismiss the petition, such decree is interlocutory and will not support an appeal.

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APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. J. C. CARMICHAEL.

On April 8, 1899, Dora Robinson claiming to be a stockholder in the National Guarantee Loan & Trust Company, a building and loan association, filed her bill in the chancery court of Jefferson county, in which she averred, among other things, the insolvency of said corporation and the mismanagement of its funds and assets; and in said bill she prayed for the appointment of a receiver of said corporation. Upon the filing of the bill a receiver was appointed.

On September 13, 1900, the appellant, P. C. Walker, filed his petition in said cause, in which he averred that in July, 1890, he became a stockholder in said company and acquired a certificate for ten shares of stock; and subsequently acquired other shares of stock in said company; that by the terms of the by-laws of said corporation, he had a right to withdraw his stock and said company agreed to pay the withdrawal value of said stock thirty days after the filing of the notice of withdrawal; that he filed his notice for withdrawal, and that on March 23, 1899, he received a certificate from said company stating the amount due him upon withdrawal.

The petitioner then further averred in the petition that "he was never paid anything, but by reason of said application and the by-laws of the company he became a creditor of said company and was entitled to his money within thirty days after said 23d day of February, 1899, at which time the said National Guarantee Loan & Trust Company was a going concern, and petitioner had no notice of its insolvency, if it was insolvent."

The prayer of the petition was that the petitioner be allowed to "intervene in said cause as one of the creditors in said company and be declared to be a creditor of said company," and that he be allowed the payment of the sum named in the certificate of withdrawal with interest thereon. To this petition the receiver of the corporation demurred, upon the ground that said petitioner was not a general creditor of the corporation, but was a stockholder thereof, and was only entitled

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to his *pro rata* share in the assets after the debts of the corporation were paid.

Upon the submission of the petition upon the demurrer the chancellor decreed "that said demurrer be and the same is hereby sustained. Leave is given the petitioner to amend until September 15, 1901." From this decree the present appeal is prosecuted, and the rendition thereof is assigned as error.

LANE & WHITE, for appellant.

W. K. TERRY, *contra*.

SHARPE, J.—An appeal is here attempted from a decree which did not dismiss the intervening petition as was the case where this court entertained the appeal in *Thornton v. H. A. & B. R. R. Co.*, 94 Ala. 353, but which merely sustained a demurrer to the petition and left it pending. Such a decree is interlocutory and is not within the provisions of any statute allowing appeals. This court is, therefore, without jurisdiction to entertain the attempted appeal, and it will be dismissed.

Appeal dismissed.

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Statutory Action of Ejectment.

1. *Ejectment; delivery of deed; admissibility of evidence.*—In an action of ejectment, where the material question at issue is, whether there was a sufficient delivery of the deed to pass title to the property involved in the suit, and the evidence shows that after signing and acknowledging the deed the grantor therein left it with his attorney, who had been representing him in making an exchange of lands with the grantee in said deed, it is competent to introduce evidence of the transactions between the grantor and the grantee, and what was said and done at the time of the delivery of the deed by both of said parties as well as the attorney.

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2. *Ejectment; delivery of deed; charge of court to jury.*—In an action of ejectment, where the material question at issue is, whether there was a sufficient delivery of the deed to pass title to the property involved in the suit, and there was evidence introduced from which the jury might have inferred an intention on the part of the grantor to deliver the deed to the grantee named therein, the general affirmative charge requested by either party is properly refused; the intention of the grantor in the transaction being a question of fact to be determined by the jury from the circumstances attendant at the time.
3. *Same; same; same.*—In such a case, a charge is properly refused as being misleading, which would authorize the jury to conclude that the delivery of the deed to the grantee in person was necessary, in order to constitute a delivery thereof.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. A. A. COLEMAN.

This was a statutory action of ejectment brought by the appellee, J. W. Brigman, against the appellant, Joseph Fitzpatrick, to recover certain lots in the city of Ensley, specifically described in the complaint. The defendant pleaded the general issue. This is the second appeal in this case.

The common source of title was admitted to be in one Isaac Price. The plaintiff introduced in evidence a quit claim deed for the property sued for, from Isaac Price to R. M. Buck, dated March 12, 1895, acknowledged March 19, 1895, and which was filed for record on September 27, 1899. He also introduced in evidence a warranty deed conveying the same lands from R. M. Buck to T. G. Elder, which was acknowledged and recorded March 4, 1895, and also a warranty deed, conveying the same lands from T. G. Elder to plaintiff, J. W. Brigman, which deed was dated, acknowledged and filed for record on March 24, 1898.

The defendant introduced in evidence a quit claim deed to the property in controversy from Isaac Price to the defendant, dated April 26, 1898, acknowledged April 27, 1898, and filed for record November 28, 1898. It was shown at the time of the second trial Isaac Price was dead.

The testimony given by said Isaac Price on the former trial of the cause was introduced in evidence upon the

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second trial, after the remandment of the cause by the Supreme Court. In giving his testimony said Price stated that he had left the deed to Buck with his attorney, Mr. Selheimer, about the date the deed was signed, but did not remember anything that was said at the time; that he did not deliver the deed to Buck in person; that there was a trade between him and said Buck in which Buck was to convey to him certain property and he was to convey to Buck the lots involved in this controversy; that Buck made him a deed to the property, and thereupon, in consummation of the trade, he made the deed from him to Buck introduced in evidence, and that he took possession of the land deeded to him by Buck.

H. C. Selheimer, Esq., was introduced as a witness, and he testified that he represented Isaac Price as his attorney in the negotiations between Price and Buck in the exchange of the lands; that he did not remember what was said by Price when the deed was left with him; that the negotiations with reference to the exchange of lands between Price and Buck were going on for several months, and the parties frequently met at his office; that the trade was finally closed; that Buck executed a deed to certain lands to Price and Price paid Buck some money in cash and executed the deed conveying the lots in controversy to Buck; that he did not hold the deed for safe keeping for Price; that he had forgotten about the deed being left with him by Price until the purchase of the lots in controversy by the plaintiff in the present suit; that no one had called for the deed or requested its delivery prior to that time. The witness Selheimer was asked: "Whether or not Buck had made and delivered all the deeds required of him in said contract (between Price and Buck) prior to the execution of the deed from Price and wife to Buck." This question was objected to by the defendant upon the ground that it called for the conclusion of the witness and was incompetent and illegal. The court overruled the objection, and the defendant duly excepted. The witness answered that Buck had made all the deeds as required of him in said contract before Price's deed to him was executed. There-

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upon the witness was asked the following question: "If anything remained to be done by either party, after Buck delivered the deeds to him called for" in the contract. The defendant objected to this question upon the same grounds as were interposed to the previous question. The court overruled the objection, and the defendant duly excepted. The witness answered that nothing remained to be done except the execution of the deed from Price to Buck.

It was a fact, admitted by both parties to the suit, that at the time the defendant purchased the lots in question from Price, he had an abstract made showing the title of said Price to all the lots described in the deed, that the abstract showed the record title to the lots in the suit, as well as the other lots described in defendant's deed, to be in said Price.

Upon the introduction of all the evidence, the defendant moved the court to exclude from the jury the deed offered in evidence by plaintiff upon the ground that the evidence showed there had been no delivery of the deed from Price to Buck, and that no title having passed from Price to Buck, the deed from Buck to Elder and from Elder to plaintiff conveyed no title. The court overruled this motion, and the defendant excepted.

In the court's oral charge to the jury, he read that part of the opinion of the Supreme Court rendered on the former appeal of the cause, relating to the question whether the deed from Price and wife to Buck had been delivered, and then made the following statement to the jury: "Now, gentlemen, this is the opinion of the Supreme Court upon this case as presented on the former trial, but in the case before you there are other facts before you in addition to the facts shown on the former trial." To this remark of the court the defendant excepted.

The defendant separately excepted to the following portions of the court's oral charge: (1.) "That the sole question for you to determine is, did Price deliver to Selheimer the deed from him to Buck conveying the land, the subject matter of this suit, about the time he signed the same, and did he intend to surrender all control over it, and that the deed should be delivered

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by Selheimer to Buck; if such is found to be the fact, then your verdict should be for the plaintiff, if not for the defendant." (2.) "If you believe from the evidence that there was a trade between Price and Buck in which Buck was to do certain things and Price was to make a deed for the lots in question; and if you further believe from the evidence that all the conditions in the trade on Buck's part were performed by him, then I leave it to you to say whether or not these facts show an intention by Price to deliver said deed to Buck when he left it with Mr. Selheimer."

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "If the jury believe the evidence, they must find for the defendant." (2.) "If the jury believe that the deed from Price to defendant was delivered before the deed from Price to Buck was delivered to Buck, then the jury must find for the defendant."

There was verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

JOHN W. TOMLINSON and J. G. CREWS, for appellants. The undisputed facts, as was decided on the former trial, show no delivery of the deed from Isaac Price to R. M. Buck until after the execution, delivery and record of the deed from Isaac Price to appellant, and the general affirmative charge should have been given for the defendant.—*Fitzpatrick v. Brigman*, 130 Ala. 455, 5 Am. & Eng. Ency. Law (1st ed.), 445.

SMITH & SMITH, *contra*.—When Price, in pursuance of his agreement, turned over the deed he had signed on the 12th of March, 1895, to Selheimer, he was entitled to demand and receive the deeds held for him signed by Buck.—*White Star Line Steamboat Co. v. Moragne*, 91 Ala. 610.

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DOWDELL, J.—Additional facts are shown in evidence by the record on this appeal to those appearing on the former appeal in this case.—*Fitzpatrick v. Brigman*, 130 Ala. 450.

Both parties claim from a common source of title. It is a question of superiority of title. And the question of the delivery of the deed from Price, the common source, to Buck, at the time this deed was left by Price with Selheimer, is the pivotal one in the case. If the act of Price in leaving the deed in the possession of Selheimer amounted to and operated as a delivery to Buck, then the plaintiff who derived title through Buck, has the superior title; otherwise the defendant has the superior title. The intention of Price upon leaving the deed in the possession of Selheimer becomes a material inquiry on the question of delivery. What is necessary to constitute a delivery was fully discussed on the former appeal, and we content ourselves with what was then said, as being sufficient for present purposes. What was Price's intention is a question of fact to be determined by the jury from the attendant circumstances at the time. And to this end it was competent on the trial to adduce evidence of the transaction between Price and Buck, and what was said and done at the time by both of said parties, as well as by Selheimer, who acted as attorney for Price. There is, therefore, we think, no merit in the exceptions reserved to the questions asked, and the answers made by, the witness Selheimer, as shown in the record.

That there were additional facts shown in the evidence on the last trial, to those on the former trial, was undisputed, and consequently there was no error in that portion of the oral charge excepted to, in which the court made such statement. That portion of the oral charge excepted to, in which the court submitted to the jury the question of intention on the part of Price as to the delivery of the deed was free from error.

There was evidence from which the jury might have inferred an intention on the part of Price to deliver the deed to Buck, when he left it in the possession of Selheimer, and, therefore, the court properly refused the

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general charge requested by the defendant.

The second written charge requested by the defendant had a tendency to mislead, in that the jury might have been led by it to the conclusion that a delivery of the deed to Buck in person by Price was necessary to be shown in evidence to constitute a delivery.

We find no error in the record, and the judgment is affirmed.

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Action upon Promissory Note.

1. *Promissory note; when demand for trial by jury waived, and judgment by default proper without writ of inquiry.*—Where in a suit on a promissory note, after the defendant files pleas accompanied by a demand for a trial by jury, the parties enter into an agreement, wherein it is stipulated that if the amount sued for is not paid within a stipulated time, judgment by default can be rendered for the full amount of the claim with interest, a judgment by default, after the lapse of the stipulated time, ascertaining the debt and damages without a jury, is proper and not subject to objection; said agreement, in effect, withdrawing the pleas, and putting the case on the same footing as if they had never been filed and no demand for a jury had ever been made.
2. *Same; judgment under agreement.*—In an action upon a promissory note, where there is an agreement that after the lapse of a specified time there should be a judgment for plaintiff "by default for full amount of the claim sued on and interest to date of judgment and cost of suit," a judgment for more than the amount of the note with interest to date of judgment and the costs of the suit, is erroneous.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

The appellee, the Peoples National Bank of Waynesboro, Pa., brought this action against the Peoples Ice

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Company and counted upon a promissory note executed by the defendant and which was alleged to have been the property of the plaintiff.

The defendant filed the plea of the general issue and a special plea which set up a want of consideration. Accompanying this plea was a demand for a trial by jury. Subsequent to the filing of these pleas there was an agreement entered into between the parties, on March 18, 1901, which was in words and figures as follows: "In this cause it is agreed that the case shall not be called for trial during the present week, but shall be passed; and in the event that amount sued for, including interest and costs of suit, be not paid within ten (10) days from this date, then the plaintiff shall have judgment by default, for the full amount of the claim sued on and interest to date of judgment, and costs of suit."

On April 8, 1901, there was a judgment by default rendered in favor of the plaintiff, assessing the amount of plaintiff's recovery at \$1,119.43. From this judgment the defendant appeals, and assigns the rendition thereof as error.

LANE & WHITE, for appellant, cited *Freeman v. Bridges*, 123 Ala. 287.

W. E. FORT and WALKER, PORTER & WALKER, *contra*. Appellant waived his demand for jury trial by the agreement and by offering no objection in the court below. Said judgment was in the nature of a judgment by confession, which waives all errors.—*Blankenship v. Parsons*, 113 Ala. 275; *Burke v. State*, 74 Ala. 399.

MCCLELLAN, C. J.—Though the defendant on filing its pleas demanded a jury for the trial of the cause, yet when afterwards it in effect withdrew its pleas and entered into an agreement that judgment after the lapse of a specified time should be entered for plaintiff "by default for the full amount of the claim sued on and interest to date of judgment, and costs of suit," the claim sued on being a promissory note executed by the defendant, it was not entitled to a jury to assess plain-

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tiff's damages. The agreement for a judgment *by default* put the case in court on the same footing as if the defendant had never appeared at all to file pleas or to demand a jury, and there being no occasion for a writ of inquiry the court was authorized to proceed to judgment ascertaining the debt and damages without a jury.

The agreement was, however, as we have seen, for judgment for the amount of the claim sued on and interest to date of its rendition. The claim sued on was a promissory note for one thousand dollars, and this sum with the interest thereon and costs of protest was claimed in the complaint. The city court entered judgment on April 8, 1901, for \$1,119.43. The note was due May 18, 1900. The interest for the period is \$71.33. The protest fees amount to three dollars. It is not a case for the allowance of special damages. So that the judgment for \$1,119.43 was excessive and erroneous. It should have been for \$1,074.33. It will be here corrected so as to stand for the latter sum, and as corrected will be affirmed.

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Bill in Equity for the Dissolution of a Corporation and for Distribution of Assets.

1. *Corporations; right of minority stockholder to maintain bill to distribute assets of corporation.*—When a private business corporation, though solvent, in that it owes no debts, is a failure, and the purposes for which it was organized are impossible of attainment, and its assets are being gradually sacrificed in the payment of taxes and expenses, the minority stockholders of such corporation can maintain a bill in equity to have the corporate assets sold and the proceeds thereof distributed among the stockholders.
2. *Chancery pleading and practice; when not necessary to make all persons interested in the cause parties to suit.*—When the

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parties to a cause are numerous or some of them are unknown or beyond the jurisdiction of the court, but they all belong to a class whose rights are analogous to those of the parties actually before the court, and who fully represent the adverse interest of all, it is not necessary under the rules of chancery practice, (Code, p. 1205, Rule 19, Chancery Practice), in order to the maintenance of a suit in chancery concerning the common cause of action, that all of the parties in interest should be made parties to such suit.

3. *Same; same; case at bar.*—Where a bill is filed by the minority stockholders in a corporation, seeking to have the assets of the corporation distributed among all the stockholders, and it is averred in the bill that the stockholders of said corporation are numerous, that one-third of the stockholders are non-residents or their residence can not be ascertained, that the respondents are the principal and largest stockholders and fully and fairly represent the adverse interest of all of the stockholders in said corporation, that all of the stockholders belong to the same class and their respective interests are analogous, such bill is not subject to demurrer, upon the ground that all the stockholders are not made parties thereto.

APPEAL from the Chancery Court of Etowah.

Heard before the Hon. R. B. KELLY.

The bill in this case was filed by the appellants, John H. Noble and others, against the Gadsden Land & Improvement Company and several stockholders of said company. The purpose of the bill and the facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The appeal is prosecuted from a final decree of the chancellor denying the relief prayed for and ordering the bill dismissed for the want of equity; and the rendition of this decree is assigned as error.

J. J. WILLETT, for appellants.—The chancery court has inherent jurisdiction to dissolve a private business corporation, which has made a failure of its business, and to distribute its assets at the suit of minority stockholders, upon the theory that such court will intervene to protect the trust funds which are in danger.—1 Perry on Trusts (5th ed.), p. 360, § 242, note a; *Satterfield v. John*, 53 Ala. 127; *Fort Payne Co. v. Fort Payne Co.*, 96 Ala. 477; 1 Morawetz on Corporations, §§ 239, 240.

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It is no objection to the maintenance of such a bill that the corporation has a full board of directors who are competent to manage the affairs of the company.

Directors have no authority to dissolve a corporation or even to distribute its assets. The following authorities are overwhelming to the point that directors can only attend to the usual course of business, and cannot, without the consent or authority of a majority of the stockholders, sell all of the assets of a solvent corporation, and strip it and disqualify it for accomplishing the purpose for which it was organized.—3 Thompson on Corporations, § 3983; *Railway Co. v. Allerton*, 18 Wallace 233; *Elyton Land Co. v. Dowdell*, 113 Ala. 177; 2 Cook on Corporations, (new ed.), § 670; *Abbott v. American Hard Rubber Co.*, 33 Barbour, 578; *Kean v. Johnson*, 9 N. J. Equity, 401; *Baker's Appeal*, 109 Pa. 461; *People v. Ballard*, 134 N. Y. 269; *Middlesex R. R. v. Boston R. R.*, 155 Mass. 347; 7 Am. & Eng. Ency. Law (2d ed.), 734-5.

The averments of the bill in this case were sufficient to give the chancery court jurisdiction and to call for the exercise thereof.—4 Thompson on Corporations, §§ 4443, 4538, 4545; *McKleroy v. Gadsden L. & I. Co.*, 126 Ala. 193; *Fougeray v. Cord*, 50 N. J. Eq. 185; 24 Atl. Rep. 499; *Price v. Holcomb*, 56 N. W. Rep. 407; *Grant v. Furniture Co.*, 26 So. Rep. (La.) 97; *Arents v. Tobacco Co.*, 101 Fed. Rep. 338; *O'Conner v. Hotel Asso.*, 28 S. W. Rep. 308; *State v. Cannon Riv. Corp.*, 69 N. W. Rep. 621; *Slee v. Bloom*, 10 Am. Dec. 273; *Briggs v. Penniman*, 18 Am. Dec. 454; Gluck & Becker on Receivers (2d ed.), 59; 1 Beach on Corporations, §§ 782, 783, 784; 1 Morawetz on Corporations, (2d ed.), §§ 239, 285, 412.

It was unnecessary to make all of the stockholders of the defendant corporation parties to the bill.—Code, p. 1205; *Arents v. Tobacco Co.*, 101 Fed. Rep. 338; 1 Daniel Chancery Practice (5th ed.), § 190, note 5; Story's Equity Pleading, §§ 99-115; 4 Thompson on Corporations, § 4565; *Weale v. Water Works Co.*, 1 J. & W. 358; *Lebeck v. Ft. Payne*, 115 Ala. 447; *Morton v. Railway Co.*, 79 Ala. 610; *State ex rel v. Webb*, 97 Ala. 111.

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WILLIAM H. DENSON, *contra*.—The bill was deficient and subject to demurrer, in that it did not make all the stockholders of the defendant corporation parties thereto.—*McKleroy v. Gadsden L. & I. Co.*, 126 Ala. 193; 2 Cook on Corporations (4th ed.) § 629, and authorities; *George v. Benjamin*, 69 Am. St. Rep. 963.

TYSON, J.—The bill in this cause after amendment is the complaint of three stockholders owning in the aggregate twenty-eight hundred shares of the capital stock of the respondent corporation, and prays to have the corporation dissolved and its assets, which consist of six hundred acres of land, sold and its proceeds distributed among the stockholders, for general relief, etc. The corporation is a private trading one and has a capital of two millions, five hundred thousand dollars (\$2,500,000) divided into twenty-five thousand (25,000) shares of the par value of one hundred dollars (\$100) each. The purpose of its organization was the building of a town upon the tract of land owned by it. To this end, this land was to be divided into lots, to be sold to those who could be induced to purchase them, and the company was to procure, if possible, the location of industrial enterprises on its lands and thus enhance its value and make salable its lots. In short, it is what is known as a "boom concern." It was organized when the country was rife with speculation; and now that conservatism in financial matters has returned, after a severe experience during the years of financial depression, the company is left with this tract of land, and nothing more, worth probably fifteen or twenty thousand dollars. Fortunately, it has no creditors, and, therefore, no one interested in its affairs, except its stockholders, who are shown to have abandoned the enterprise, leaving it to be managed by its board of directors as best they can. For five years, its president and secretary have made diligent efforts to have the stockholders meet. Many of them are non-residents of this State, and those who are residents, decline to attend the meetings when called, after being notified and urged to do so. There are three hundred and forty-five of them, and the whereabouts of one-third of the

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number is unknown and unascertainable, and the remaining two-thirds have lost all concern or interest in the affairs of the company. The fixed charges which the corporation is bound to meet annually, in the way of taxes, licenses, etc., is between six and seven hundred dollars. Its income annually is only about fifty dollars. So that, each year a portion of its tract of land is sold by the State, county and city of Gadsden to pay these charges. It is wholly without credit and its assets are being sacrificed, the corporation, on account of the abandonment of it by the holders of the majority of its stock, being powerless to prevent it.

It is upon substantially the foregoing state of facts, which is shown both by the averments of the bill and the testimony, that the complainants seek relief.

On final hearing the chancellor dismissed the bill for want of equity, holding that, in the absence of a statute, the chancery court is without jurisdiction to dissolve the corporation and to distribute its assets at the suit of a minority stockholder.

Where the corporation is a going concern, it is undoubtedly true that a minority stockholder cannot maintain a bill to have it dissolved or to have its assets distributed. In such case, the shareholders who disapprove of the company's management or consider their speculation a bad one, their remedy is to elect new officers or to sell their shares and withdraw. "They cannot insist on having the company's business closed and the assets distributed, against the will of a single shareholder, who wishes to have the business continued."—1 Morawetz on Corp. § 283. But where the corporation has been abandoned by its stockholders, as here, and is, therefore, powerless to protect its assets and to discharge its duty to the stockholders as their trustee, minority stockholders who are *cestuis que trust*, if the chancery court has no jurisdiction to rescue the trust fund from the perils endangering its destruction, would be remediless. No efforts of theirs to have their trustee sell the lands and distribute its proceeds could avail them, for the obvious reason, that it would require the consent of the holders of a majority of the stock to thus strip the corporation of its assets, which

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is shown in this case cannot be obtained, not because of their unwillingness to give it, but on account of their lack of interest in the company. Clearly its directors cannot do so, the corporation not being insolvent. They are merely the managing agents of the business of the corporation, to promote the ends designed by its charter and do not possess such power or authority.—*Elyton Land Co. v. Dowdell*, 113 Ala. 186; 3 Thompson on Corporations, § 3983; 1 Morawetz on Corp. § 513; 2 Cook on Corp. (4th ed.), § 670. These complainants desiring, as they do, to have this trust fund protected and administered so as they may get their part of it, have in our opinion, under the facts of this case, the right to maintain this bill to have the lands sold and its proceeds distributed among the stockholders. On former appeal (*McKleroy v. Gadsden Land & Improvement Co.*, 126 Ala. 193), we said: "It is held in *Planters Line v. Waganer*, 71 Ala. 581, that a private corporation, entered into solely for benefit of the shareholders, and involving no public duty, may be dissolved by the stockholders; and on the same principle, when the purpose of such an association is a failure, we quite agree with Mr. Thompson that there should be in the chancery court an inherent power to administer the property so as to restore to the *cestuis que trust* (the stockholders) their ultimate interest.—4 Thomp. on Corp. [§§ 4443, 4538,] § 4545; *Fougeray v. Cord*, 50 N. J. Eq. 185; *Price v. Holcomb* (Iowa), 56 N. W. Rep. 407." In 1 Morawetz on Corp., section 284, it is said: "Whenever, in the course of events, it proves impossible to attain the real objects for which a corporation was formed, or when the failure of the company has become inevitable, it is the duty of the company's agents to put an end to its operations and to wind up its affairs. Under these circumstances, the majority would have no right to continue to use the common property and credit for any purpose, because it would be impossible to use them for any purpose authorized by the charter. If the majority should attempt to continue the company's operations in violation of the charter, or should refuse to make a distribution of the assets, any shareholder feeling aggrieved would be en-

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titled to the assistance of the courts and a decree should be made ordering the directors to wind up the company's business and distribute the assets among those who are equitably entitled." See also section 412 of same book.

(In 2 Beach on Corp., section 783, the author says: "Unless it appears beyond question, that the continuation of a profitable business cannot be had, the dissolution of a corporation not yet insolvent will not be decreed upon petition of a minority of its shareholders. If, however, it is clear that the business cannot be profitably continued, the petition of a minority for a dissolution will be granted.")

Spelling, in his work on Corporations, states the rule in substance to be, that the court would, in case the scheme was impossible, not allow the funds to be diverted to other purposes, but would enjoin such diversion at the suit of a stockholder and as incidental give full relief by decreeing a settlement of the corporate liability and a distribution of the remainder among the stockholders.

In *Price v. Holcomb*, *supra*, the Supreme Court of Iowa, notwithstanding the provisions of a statute that "No corporation can be dissolved prior to the period fixed in the articles of incorporation, except by unanimous consent, unless a different rule has been adopted in their articles," held that "if a sale of the property was necessary the right to make it would not be defeated even if it had the effect of dissolving the corporation."

The case of *O'Connor v. Knoxville Hotel Association* (Tenn.), 28 S. W. Rep. 309, in its facts, is very similar to the one in hand. The bill was filed by a single stockholder against the corporation and other stockholders in which the facts alleged showed an abandonment of the enterprise and the original scheme to be impossible of consummation, and prayed for a distribution of the assets of the company. It was insisted there, as here, that the bill was without equity. The court after reviewing the authorities held the bill had equity and that the complainant was entitled to relief on common law grounds.

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Other authorities might be quoted to sustain the right of the complainants to the exercise of the jurisdiction of the court to have the assets of the respondent corporation distributed. See also *Arents v. Blackwell's Durham Tobacco Co.*, 101 Fed. Rep. 345; *Cramer v. Bird*, L. R. 6 Eq. 143; *Baring v. Dix*, 1 Cox, 213; 1 Perry on Trusts (5th ed.), § 242, and note a.

While the authorities are not in accord as to the right of the courts, in a proper case, to dissolve the corporation, they are practically unanimous, so far as our research has extended, in sustaining the right of the complainants, under the facts of this case, to have the assets of the corporation distributed, which may be done under the orders and directions of the court through the agents of the corporation. And while the writer is inclined to the view that the court has the jurisdiction to dissolve the corporation, yet it is not necessary to go to that extent, as the rights of the complainants can be fully subserved by the court's administration of the trust estate through the agents of the corporation.

The other question, though not passed upon by the chancellor, but raised by demurrer, is that all the stockholders are not made parties to the bill. Of the total shares—twenty-five thousand (25,000)—of the capital stock, nine thousand eight hundred and ninety-nine (9,899) are owned and held by the parties to this cause. Of this latter number, seven thousand and ninety-nine (7,099) shares are held and owned by the thirteen (13) respondents to the bill. As stated above, one-third of the stock is held by persons whose residences cannot be ascertained and who reside in all parts of this country. The respondents are, it is averred, the principal and largest stockholders and fully and fairly represent the adverse interest of all the stockholders in the corporation; that all the stockholders belong to the same class, and their respective interests are analogous. It is also averred that it would be impossible to ever bring the cause to a final hearing, if complainants are required to make all the stockholders parties; and such a requirement would result in inconvenience, oppressive delays and a consumption of

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a large part of the assets of the company in court costs. It is clear to us that these averments bring the case under the operation of the provision of Rule 19 of Chancery Practice.—Code, p. 1205. In *Morton v. N. O. & Selma R'y. Co.*, 79 Ala. 610, speaking to this point, the court said: "The rule is, that when the parties to a cause are numerous, or some of them are unknown or beyond the jurisdiction of the court, so as not to be subject to its process, but they all belong to a class whose rights are analogous to those of parties actually before the court, because dependent on the same principles of law, the court will often proceed to adjudge the rights of the class as such, and, in the absence of all collusion, the decree will be considered binding upon the whole class who are in a like situation. * * *

This rule is fully recognized by Rule No. 20 [now No. 19] of our Chancery Practice, which makes it discretionary with the chancellor, in such case, to dispense with bringing before him all the interested parties, and provides that the court may proceed in the cause without making such persons parties, provided it has sufficient parties before it to represent all the adverse interests of the plaintiff and the defendant in the suit. Nor is it repugnant to the concluding provision found in the same rule, declaring that 'the decree shall be without prejudice to the rights and claims of the absent parties.' * * *

This, as we shall proceed to show, is the right to come in under the decree, and not antagonistic to what is properly settled by it." See also *Sanche v. Webb*, 97 Ala. 111; *Campbell v. Railroad Co.*, 1 Wood, 368.)

The decree dismissing the bill for want of equity will be reversed and the cause remanded, with directions to the lower court to enter a decree ordering a sale of the land for distribution, and for such other orders or decrees as may be necessary to an equitable and orderly administration of the trust estate.

Reversed and remanded.

[Nolen, *et al.* v. Doss *et al.*]**Nolen *et al.* v. Doss *et al.****Final Settlement of the Administration of an Estate.*

1. *Descent and distribution; when widow is entitled to all the personal property of deceased husband.*—Under the statute, where a person dies intestate and leaves a widow but no children, the widow is entitled to all the personal estate, (Code, § 1462); and the fact that at the time of the death of the husband he and his wife were separated, does not affect the descent and distribution as prescribed by the statute, provided the marriage relation in law continued.
2. *Same; same; admissibility of evidence.*—Where, on the final settlement of the administration of a decedent's estate, the material question is as to whether or not his widow is entitled to take the personal property of the estate, there being no children, testimony tending to show that the wife of the decedent, at the time of his death, lived apart from him and cohabited with another man, holding herself out as his wife, is incompetent, immaterial and properly excluded.
3. *Final settlement of administration; widow competent witness.* On the final settlement of the administration of decedent's estate, the widow is a competent witness to testify to the fact of her marriage with decedent.

APPEAL from the Probate Court of Jefferson.

Heard before the Hon. J. P. STILES.

The proceedings in this case were had upon the final settlement of an administration of the estate of Otis Doss, deceased. The appellants who were the defendants in the court below and filed exceptions to the account of the administrator, were the sister of the deceased and the children of the brother of the deceased.

It is claimed by the appellees that Julia Doss is the widow of the deceased, Otis Doss, and as such is entitled to receive the entire estate, which consists entirely of personal property. That she is the widow, or, at least, such widow as can inherit the estate, is denied by the appellants.

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Otis Doss died in Jefferson county, Alabama, on the 29th day of August, 1899, and on the 16th day of September, 1899, the said Julia, giving her name as Julia Doss, and Robert C. Redus, filed their petition to be appointed administrators of the estate of the deceased, the said Julia claiming to be widow of the deceased, and asking that Redus be joined with her as co-administrator. They were duly appointed and they duly qualified as such administrators, but on the 12th day of October, 1899, the said Julia resigned as administratrix, leaving the said Redus as sole administrator of the estate, who has acted as such ever since.

On the 19th day of October, 1899, the said Julia, claiming to be the widow of the deceased, filed a petition in the probate court asking that her exemptions as such widow be set apart to her. The court appointed commissioners to set off and allot to her the exemptions; and on the 23d day of November, 1899, the court confirmed the report of the commissioners and ordered that certain articles of personal property and \$988.36 in money be allowed to her as such widow. Of this proceeding the heirs, appellants herein, had no notice or knowledge.

On the 17th day of September, 1900, the administrator filed his account for final settlement, naming the said Julia, and these appellants, and the four minor heirs referred to, as "the heirs and distributees of said deceased." The account further showed that the administrator had paid out to the said Julia the amount of \$811.30.

The said heirs, Essie Nolan and others, the appellants, then filed exceptions to the said account, objecting to the allowance of the various credits for money paid the said Julia. The administrator demurred to the exceptions, and the court sustained the demurrer. The appellants then filed their claim as distributees of the estate, and the said Julia then presented her claim in the form of a petition, as widow and sole distributee of the estate. The appellants then filed their answers to the said claim of the said Julia.

Upon the hearing of the evidence, the court confirmed and allowed the account of the administrator, and held

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that the said Julia was the widow of the deceased, Otis Doss, and as such entitled to inherit the entire estate of the deceased, which consisted of personal property only. To the rendition of this decree the defendants duly excepted. Defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

J. W. BUSH, JAS. A. MITCHELL and J. G. CREWS, for appellant, cited *Prater v. Prater*, 87 Tenn. 78; *Odiorne's Appeal*, 54 Pa. St. 175; *Arthur v. Israel*, 15 Col. 147.

ROBERT J. LOWE, *contra*.—The statute provides that "the widow, if there are no children, is entitled to inherit all the personal estate."—Code, § 1462; *Pelier v. McCoy*, 15 Ala. 439; *Martin v. Martin*, 22 Ala. 86; *Williams v. McCouird*, 27 Ala. 572.

DOWDELL, J.—This is an appeal from a decree of the probate court of Jefferson county on final settlement by the administrator of the estate of one Otis Doss. While a number of exceptions were reserved on the hearing to the rulings of the court, the material question is as to whether one Julia Doss was entitled to take the personal property of the estate, there being no children.

The statute directs the disposition of the estate of one dying intestate. Code, section 1462, provides as follows: "The personal estate of persons dying intestate as to such estate, after the payment of debts and charges against the estate, is to be distributed in the same manner as his real estate, and according to the same rules; except that the widow, if there are no children, is entitled to all of the personal estate," etc. The statute makes no exceptions on account of the wife's conduct, not even in cases of voluntary abandonment by her of the husband. The law as it is written is plain, and it is not within the province of the courts to engraft upon it any exceptions. As long as the marriage relation in law continues, just so long the rights of the wife under this statute exist. The evidence with-

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out dispute showed the marriage of Julia and Otis, that they lived together as husband and wife for many years, and up to about four years before the death of Otis, and that the said Otis died leaving no children. On this state of the proof under the statute Julia was entitled as the widow of decedent to all of the personal property of the estate of the decedent intestate after the payment of the debts and charges against the estate.

The evidence offered by appellants tending to show that Julia, after separation from her husband, lived and cohabited with another man, holding herself out as his wife, was properly excluded as being immaterial to the issue. The doctrine of estoppel insisted on by counsel, has no application.

The competency of the wife to testify to the fact of her marriage with the deceased husband is not affected by the exception contained in section 1794 of the Code. The contest here is between the parties claiming to be distributees of the estate—as to whether the appellants are the distributees, or the appellee Julia Doss is the sole distributee. The estate of the decedent is not interested in the result of this controversy within the meaning of the statute.—*Henry v. Hall*, 106 Ala. 84; *Snider v. Burks*, 84 Ala. 53; *Kumpe v. Coons*, 63 Ala. 448.

We find no error in the record requiring a reversal of the decree of the court.

Affirmed.

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Action against Railroad Company by Employee to recover Damages for Personal Injuries.

1. *Action against railroad company for personal injuries; sufficiency of complaint.*—In an action against a railroad company by an employee to recover damages for personal injuries, a

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complaint which alleges that while the plaintiff was engaged in the performance of his duties, the defendant's engineer, naming him, "who was in charge and control and superintendence of said engine," negligently moved said engine at a dangerous rate of speed up to and against a car on the track of the defendant, by reason of which the coupling pin on said car was thrown with great force against the face of the plaintiff who was standing upon the running board of the engine for the purpose of coupling said car, and by reason of such blow the plaintiff suffered the injury complained of, states a cause of action under subdivision 5 of section 1749 of the Code.

2. *Action against a railroad company; admissibility of evidence.*

In an action against a railroad company by an employee to recover for personal injuries, where the complaint alleges that by reason of certain stated negligence on the part of the engineer the coupling pin "was thrown with great force against the plaintiff's face, striking him near his eye, whereby serious injury was inflicted on the plaintiff, his right eye being permanently impaired," and "from which plaintiff has suffered great mental and physical pain and anguish," it is competent for the plaintiff to introduce testimony showing that from the stroke of the pin he had suffered pain, in having headaches, and in having pains darting through his head in the region of the eye.

3. *Same; same.*—In such a case, where the plaintiff had testified that since the injury described in the complaint, his eyes or one of them, had in consequence of such injury been inflamed and weak, it is not competent for the defendant, on cross examination of the plaintiff, to prove the condition of the eyes of the plaintiff's father and mother, or of his brothers and sisters.

4. *Charge to the jury; properly refused when assuming the truth of the testimony of a particular witness.*—A charge to the jury which assumes as absolutely true the testimony of a particular witness introduced, and the absolute correctness of the opinion of such witness, who was examined as an expert, is properly refused.

5. *Action against railroad company; charge to the jury.*—In an action against a railroad company by an employee to recover damages for personal injuries, where there was evidence showing that the plaintiff had been continuously at work receiving practically the same wages since the day of the accident, it is not erroneous for the court to refuse to give to the jury charges instructing them that the plaintiff had been able since his injury to earn approximately as much money as he had before.

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6. *Charge to the jury; properly refused when giving undue prominence to a particular fact.*—A charge to the jury which singles out and gives undue prominence to a fact of which there is evidence, is erroneous and properly refused; and the infirmity of such a charge is not relieved by the further instruction on the part of the court that such fact was to be considered "along with the balance of the evidence in the case."
7. *New trial; properly refused.*—The judgment of a trial court refusing a new trial on the ground that the evidence is not sufficient to support the verdict, or that the verdict is contrary to the evidence, will not be reversed unless, after allowing all reasonable presumption of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This was an action brought by the appellee, James P. Cuzzart, against the Birmingham Southern Railroad Company, to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant. In the complaint the plaintiff claimed \$8,000 damages, and it was averred that at the time of the accident complained of the plaintiff was in the employ of the defendant as a switchman, it being his duty under such employment to couple cars together and couple defendant's locomotive to cars. The complaint then averred as follows: "That while plaintiff was so engaged in the performance of his duty, and standing upon the footboard of defendant's engine, ready to couple a car thereto, when said car should be reached, defendant's engineer, one Ike Veitch, who was in charge and control and superintendence of said engine, negligently moved the said engine at a very high, extraordinary and dangerous rate of speed up to and against a car on the track of defendant, whereby a coupling pin in or on said car was thrown with great force into plaintiff's face, striking him near his eyes, whereby serious injury was inflicted upon plaintiff, his right eye being permanently impaired, disfigured and injured, and from which plaintiff has suffered great mental and physical anguish." The defendant demurred to the complaint upon the following grounds: "1. For that there

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is a misjoinder of actions in this, that plaintiff seeks to join in the same count actions under the second and fifth subdivisions of section 1749 of the Code. 2. For that said complaint is uncertain and indefinite in that it does not allege or show whether the plaintiff relies on an action under subdivision 2 or subdivision 5 of section 1749 of the Code. 3. For that said complaint alleges that the accident complained of resulted proximately from the negligence of one who had superintendence entrusted to him, but it does not allege or show that the act or negligence complained of was committed whilst in the exercise of such superintendence." This demurrer was overruled and the defendant duly excepted. Thereupon the defendant pleaded the general issue and a special plea setting up the contributory negligence of the plaintiff. The undisputed evidence showed that at the time of the accident the plaintiff was in the employment of the defendant as a switchman, and it was his duty to assist in switching the cars and to couple and uncouple the cars to one another and to the engine; that he was riding on an engine that was moving towards a car for the purpose of making a coupling with it, which coupling was to be made by the plaintiff; that when the engine and car came together, the coupling pin flew out and up and struck the plaintiff on the frontal bone just over his right eye.

The plaintiff as a witness in his own behalf testified that the result of the accident was the practical loss of his right eye from this lick. The other evidence for the plaintiff tended to show that the engine was running at an unusual rate of speed and struck the car with which the coupling was to be made, very hard and with a great deal of force, and that this blow was the cause of the coupling pin flying up and hitting the plaintiff. It was also shown by the undisputed evidence that the plaintiff returned to work for the defendant three days after the accident and worked for the defendant about two months thereafter at the same wages; that after leaving the employment of the defendant he worked with other companies and had been continuously employed up to a few days before the trial, and that the

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plaintiff had earned approximately the same wages after the accident as before it.

Dr. S. L. Ledbetter, as a specialist in diseases of the eye, testified that he had examined the plaintiff, and that the condition of the plaintiff's eye was not caused by the blow received from the coupling pin; that the plaintiff's eyes were diseased, but that the disease was caused from granulation of the lids.

Dr. J. C. Berry, a practicing physician, testified that he dressed the wound of the plaintiff when he was hurt in the accident for which the suit was brought, that the wound was a small laceration above the eye in the edge of the eyebrow, but that the eye was hurt in no way by the blow received. The other facts of the case necessary to an understanding of the decision on the present appeal, are sufficiently stated in the opinion.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked. (1.) "If the jury believe all the evidence in this case they must find a verdict for the defendant." (4.) "The court charges the jury that under the evidence in this case, they can not find a verdict for plaintiff for any alleged injury to his eye." (6.) "If the jury believe from the evidence that the trouble to plaintiff's eye consists of granulation of the lids and a flattening of the eye, and a cloudiness of the cornea of the eye, then they can not find a verdict for plaintiff on account of any alleged injury to his eye." (7.) "The court charges the jury that in this case the evidence shows that the plaintiff, since the accident happened to him, has been able to earn approximately as much money, by his work, as he did before the accident." (8.) "The court charges the jury that even if they should find a verdict for the plaintiff, they can not allow him any damages on account of any inability on his part to earn as much money now or in future, as he was able to earn before the accident." (9.) "The court charges the jury that in this case the evidence shows that plaintiff is able to earn as much money now as he was earning before the happening of the accident." (10.) "The court charges the jury that in considering the evidence i

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this case as to the extent of the injuries received by the plaintiff, they can consider along with all the balance of the evidence in the case, the fact, if it be a fact, that plaintiff went to work three days after the accident, and continued to work till last Saturday. This must be considered by the jury along with all the other evidence in the case."

There were verdict and judgment for the plaintiff, assessing his damages at \$750. The defendant moved the court for a new trial, upon the ground that the verdict of the jury was excessive; that the verdict was contrary to the evidence, and that the evidence in the case was not sufficient to support the verdict. This motion was overruled. To this ruling the defendant duly excepted.

The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

SMITH & WEATHERLY and E. D. SMITH, for appellant. The court should have sustained the demurrer to the complaint. The complaint combines an action under subdivision 2, with an action under subdivision 5 of section 1749 of the Code. This was a misjoinder of actions.—*H. A. & B. R. R. Co. v. Dusenbery*, 94 Ala. 413; *L. & N. R. R. Co. v. Mothershed*, 97 Ala. 261; *R. & D. R. R. Co. v. Weems*, 97 Ala. 270; *Birmingham Ry. & Elec. Co. v. Baylor*, 101 Ala. 488; *Laughran v. Breuter*, 113 Ala. 509.

The court erred in allowing the plaintiff to testify as to his headaches which he said were produced by the lick from the pin.

The suit was for injury to his eye, nothing is mentioned in the complaint about any headaches, or other injuries than those involved in the injury to the eye. It was not a part of the *lis pendens*.—*A. G. S. R. R. Co. v. Richie*, 99 Ala. 346.

The court should have given the several charges requested by the defendant.—*A. G. S. R. R. Co. v. Smith*, 81 Ala. 221; *H. A. & B. R. R. Co. v. Mddox*, 100 Ala. 618; *Dean v. E. T. V. & Ga. R. R. Co.*, 98 Ala. 586; *R. R. Co. v. Burton*, 97 Ala. 240; *Dantzler v. DeB. C. & I. Co.*, 101 Ala. 309; *Sheffield v. Harris*, 101 Ala. 564;

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Culver v. Ala. Mid. R. R. Co., 108 Ala. 330; *Seaboard Manfg. Co. v. Woodson*, 94 Ala. 143.

The motion for a new trial should have been granted. *Cobb v. Malone*, 92 Ala. 630; *B. R. & E. Co. v. Clay*, 108 Ala. 233; *Anderson v. English*, 25 So. Rep. 748; *Davis v. Miller*, 109 Ala. 589.

ARTHUR L. BROWN and SUMTER LEA, *contra*.—The charges requested by the defendant were properly refused.—*Woodworth v. Williams*, 101 Ala. 264; *Steed v. Knowles*, 97 Ala. 573; *Chandler v. Jost*, 96 Ala. 596; *A. G. S. R. R. Co. v. Richie*, 99 Ala. 346.

Under the rules laid down by this court, the action of the trial court in refusing the motion for a new trial should not be disturbed.—*Cobb v. Malone*, 92 Ala. 630; *White v. Blair*, 95 Ala. 147; *Dillard v. Savage*, 98 Ala. 598; *Peck v. Karter*, 121 Ala. 636.

McCLELLAN, C. J.—There is no merit in the demurrer to the complaint. An averment that A “was in charge and control and superintendence of said engine,” is no more than to aver that he was *in charge* of the engine; and the averment is supported by evidence that A. was the engineer operating the engine at the time in question. There was such evidence here. The court was, therefore, not in error either in overruling the demurrer or in refusing the general charge requested by defendant on the theory that the complaint averred one thing and the evidence went to prove another in this connection.

The complaint alleges that by reason of certain stated negligence of the engineer “a coupling pin was thrown with great force into plaintiff’s face striking him near his eyes, whereby serious injury was inflicted upon plaintiff, his right eye being permanently impaired, disfigured and injured, and from which plaintiff has suffered great mental and physical pain and anguish.” The clause “and from which plaintiff has suffered,” etc., etc., naturally refers back to the averment as to the pin striking him with great force near the eyes. Plaintiff’s testimony that from this stroke of the pin he had suffered pain in having headache a great deal

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and in having had pains darting through his head in the region of the eyes was relevant to the case so presented by the complaint, and was properly received.

The plaintiff testified that since the hurt described in the complaint his eyes, or one of them, had in consequence been inflamed and weak. The theory of defendant was that this condition had existed before the injury was received. On cross-examination of the plaintiff, counsel for defendant propounded these questions to him: "State whether your father or mother, or some of your brothers and sisters have got weak eyes?" and "State whether your father has not got eyes that are inflamed and weak?" The court sustained an objection to each of these questions. Very high authority, none other indeed than the Good Book itself, is cited by counsel for appellant in support of his exceptions to these rulings of the court. They say: "There is no truer saying in the Bible than that the sins of the fathers shall be visited upon the children unto the third and fourth generations. This is a law of heredity, promulgated by the Almighty, and is known of all men." We have acquaintance with this sacred text; but we are not prepared to admit its application in the premises here. We do not know that inflamed or weak eyes is a sin within its terms, nor are we prepared to say that these infirmities have customarily such a descendible quality as that proof of them in the sire accounts for their existence in the son. The matter lies beyond our judicial ken. If the fact be as counsel insist it is in this connection, there should have been evidence of it; we do not judicially know it to be a fact. We do not think the city court erred in its rulings on the questions.

The sixth charge requested by the defendant proceeds on the assumption of the absolute truth of the testimony of Dr. Ledbetter and the absolute correctness of his opinion as to the causes of the condition of plaintiff's eyes. There was other evidence, that of the plaintiff himself, in conflict with his as to the causes of the condition in question, and the giving of this charge would have denied the jury's undoubted right to find in line with such other evidence.

Charges 7, 8 and 9 were properly refused to the defendant. The court was under no duty to tell the jury

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that the plaintiff has been able since his injury to earn approximately as much money as he did before, even if the evidence was without conflict to that effect. And there was evidence tending to show that he could not now earn as much as he did before the injury.

Charge 10 refused to the defendant is bad for singling out and giving undue prominence to a particular fact of which there was evidence, and the infirmity is not relieved by the direction for this fact to be considered "along with all the balance of the evidence in the case."

We are not prepared to say that the verdict of the jury is so plainly against the weight of the evidence or unsupported by the evidence that a new trial should have been granted by the city court.

Affirmed.

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Contest of Probate of Will.

1. *Appeal from probate court; when bill of exceptions should be stricken from the record.*—Where the bill of exceptions in a cause tried in the probate court is not signed until after the expiration of the ten days from the date of the decree or judgment, and there is no order made by the court allowing said bill of exceptions to be signed after the expiration of the ten days, and no agreement by counsel in writing to such effect, such bill of exceptions will not be considered by the Supreme Court on appeal, but will be stricken from the record on motion properly made.
2. *Same; judgment upon motion for new trial not revisable.*—The statute allowing appeals from judgments granting or refusing to grant motions for a new trial, applies only to civil causes in the circuit and city courts, (Code, § 434); and, therefore, the action of the probate court in overruling and refusing to grant a motion for a new trial in a cause pending in such court is not revisable on appeal.

APPEAL from the Probate Court of Calhoun.
Heard before the Hon. E. F. CROOK.

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[Beatty v. Hobson, Exec.]

The proceedings in this case were had upon an application made by appellee, J. B. Hobson, as executor of the will of Jesse Beatty, deceased, to have the will of said Jesse Beatty probated. Upon the filing of this application, there was a contest filed by the appellant, William A. Beatty.

The cause was tried by the court with a jury. There was a verdict in favor of the proponent, and the court rendered a decree accordingly. The contestant filed an application for a new trial, which was overruled. The contestant appeals, and assigns as error the several rulings of the trial court and the decrees rendered. Under the opinion on the present appeal, it is unnecessary to set out the facts of the case in detail.

JAMES H. SAVAGE and WILLETT & BROTHERS, for appellant.

KNOX, BOWIE & BLACKMON and A. N. McLEOD, *contra*.

TYSON, J.—Appeal from probate court on the trial of contest of a will by the contestant.

The trial of the cause was by the court, with a jury, at a special term, resulting in a decree entered of date the 18th day of January, 1900, in favor of the proponent.

The decree contains no order for the signing of the bill of exceptions, after the expiration of the ten days allowed by section 465 of the Code. The bill of exceptions was signed on the 27th day of February, 1900, which was subsequent to the holding of the regular term in February. It is plain, therefore, that the bill of exceptions cannot be looked to for the purpose of reviewing any exceptions reserved upon the trial.—*Ala. M. R'y. Co. v. Brown*, 129 Ala. 282; 29 So. Rep. 548; *Karter v. Peck*, 121 Ala. 636; *Bank of Dothan v. Wilks*, 31 So. Rep. 451.

On the 8th day of February, four days before the convening of the court at its regular term, and twenty-one days after the trial, the contestant filed his motion for a new trial, assigning errors committed by the court

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upon the trial, which was regularly continued until the 21st of February, on which day it was overruled. In the order overruling and denying the motion fifteen days were allowed for the preparation and signing of the bill of exceptions, which, as we have shown, was signed on the 27th.

Prior to the enactment of the act of February 16, 1891, now constituting section 434 of the Code, the granting or refusing of a motion for a new trial by the judge of the circuit or city courts in civil causes, was not revisable and could not be assigned for error.—3 Brick. Dig., 404, § 2. This court has uniformly held that because this statute by its language restricts the revision of motions of this character to civil causes, that the rulings of those courts upon such motions in criminal cases is not reviewable.—*Jolly v. The State*, 94 Ala. 19; *Ray v. The State*, 126 Ala. 9. Adhering to this rule of construction, the statute, being in abrogation of the rule which has prevailed from the organization of this court, we cannot extend its provisions to the rulings of probate courts upon motions for new trials, since its language restricts the review by us to the ruling of the circuit or city courts upon such motions.

The bill of exceptions in the record having no purpose to serve, the motion to strike it must be granted, and no error being assigned upon the record proper, the decree of the probate court must be affirmed.

Cash v. Southern Express Co.

Action upon a Contract.

1. *Action upon a contract; when plaintiff not entitled to recover*
Where a contract is made, stipulating that a certain reward would be paid to the party named in said contract if he disclosed the whereabouts of a certain designated outlaw, so as to enable the party offering the reward to effect the outlaw's capture, before the party named in the contract, or his as-

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signee, can claim the reward or maintain an action to recover it under the contract, it must be shown that he furnished the information of facts actually in existence, which information in itself was sufficient to lead to, or to enable the promisor to, effect the capture; and the mere furnishing of information, vague and uncertain in character and derived from knowledge of past acts, habits and associations of the outlaw, and which do not directly lead to the capture, does not entitle the party to recover the reward stipulated for in the contract.

2. *Appeals; when error in ruling upon evidence without injury.*

Where upon the trial of a case, the evidence adduced was not sufficient to authorize the plaintiff's recovery, error in the admission or exclusion of evidence is without injury to the plaintiff, and will not work a reversal of the judgment rendered in favor of the defendant.

APPEAL from the Circuit Court of Lamar.

Tried before the Hon. S. H. SPROTT.

This was an action brought by the appellant, J. A. Cash, against the Southern Express Company, in which the plaintiff sought to recover the sum of \$2,000 for the breach of a contract alleged to have been made by the defendant through its authorized agent. The contract sued on is set out in the complaint. It appears therefrom that said contract was made with W. A. Young, and in said contract the Southern Express Company obligated itself to pay to said W. A. Young the sum of \$2,000 if he "shall disclose the whereabouts of Reuben Burrows (an outlaw) to its properly authorized representative, so as to enable the Southern Express Company to effect his capture, dead or alive." It was further provided in said contract that said Young might assign the obligation to any person or persons whom he might elect.

The plaintiff alleged that said contract had been assigned to him by said W. A. Young, and that he had complied with the conditions upon which the Southern Express Company was to pay the \$2,000, in that he had disclosed the whereabouts of said Reuben Burrows to a duly and properly authorized representative of the defendant, so as to enable the defendant to effect the capture of said Burrows; but that the defendant had broken its contract and refused to pay the said \$2,000.

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The defendant pleaded the statute of limitations and the general issue. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

Upon the introduction of all the evidence, the court gave at the request of the defendant the general affirmative charge in his behalf, to the giving of which charge the plaintiff duly excepted.

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

W. A. YOUNG, DANIEL COLLIER and J. C. MILNER, for appellant, cited *Howard v. State*, 108 Ala. 571; *L. & N. R. R. Co. v. Davis*, 103 Ala. 661; *L. & N. R. R. Co. v. Gentry*, 103 Ala. 635.

A. A. WILEY, *contra*, cited *McLaren v. Ala. Mid. R. R. Co.*, 100 Ala. 509; *Scarborough v. Malone*, 67 Ala. 570; *Hall v. Hall*, 47 Ala. 290; *Johnston v. Martin*, 54 Ala. 271; *Carter v. Shorter*, 57 Ala. 253; *Davison v. State*, 63 Ala. 432; *S. & N. R. R. Co. v. McLendon*, 63 Ala. 266; *Fountain v. Ware*, 56 Ala. 558; *Smoot v. M. & M. R. Co.*, 67 Ala. 13; *Green v. State*, 67 Ala. 539; *Bradford v. R. Co.*, 86 Ala. 574.

SHARPE, J.—Apart from any question as to the legality of the contract and of the plaintiff's status as a party to it we are of the opinion that the judgment appealed from should be affirmed. If it be assumed that plaintiff was the promisee, still to make a *prima facie* case for recovery it devolved on him to show performance of the condition upon which the reward was offered, viz.: that he should disclose Burrow's whereabouts so as to enable defendant to effect his capture dead or alive. What he did was to furnish information in the main vague and supposititious, being derived from knowledge of past acts, habits and associations of Burrow, and not on knowledge of his then location except that he had left and was absent from Lamar county,

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Alabama. Besides this known fact his disclosures pointed to Burrow's whereabouts as probably being near the Florida and Alabama line, and to his probable association under an assumed name with one Barnes in Escambia county, Alabama. Through about eight months this was effective only as a clue which led defendant's agents upon an abortive chase of Burrow until his trail was lost. He was found and captured subsequently through advices received from Barnes and others concerning facts of which the plaintiff had no knowledge and no agency in communicating and which were not in existence till after plaintiff's disclosures had ceased.

What defendant agreed to pay for was not prophecy, nor was it facts raising mere probabilities, or which in the train of causation might remotely precede a capture; but it was for information of facts actually in existence which in itself would have been sufficient to lead to, or to enable defendant to effect, the capture. There was a total failure of evidence to show that plaintiff furnished such efficient information and for that reason, if for no other, the court was justified in refusing the charges requested by him and in giving the general affirmative charge in favor of defendant.

The letters offered as evidence and rejected would not have changed the result if they had been admitted, and, therefore, their exclusion even if erroneous is not ground for reversal.

Affirmed.

Davis v. Sanders.

Action for False Imprisonment.

1. **False imprisonment; there can be no recovery for malicious prosecution.**—A complaint which claims damages for "maliciously and without probable cause therefor causing the plaintiff to be arrested and imprisoned on the charge of larceny," is an action of trespass for false imprisonment, and under such complaint there can be no recovery for malicious prosecution.

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2. *Same; same; character of action not changed by amendment.*
In such a case, the amendment of a count by adding thereto that "said charge before the commencement of this action has been judicially investigated and said prosecution ended and the plaintiff discharged," does not change the character of the action.
3. *Malicious prosecution; constituents of sufficient complaint.*—An averment of the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof, is essential to constitute a count for malicious prosecution.
4. *Action for false imprisonment; evidence of plaintiff's character not admissible.*—In an action to recover damages for false imprisonment, where the plaintiff's character has not been assailed, proof of his good character is wholly irrelevant to any of the issues involved, and such evidence should be excluded.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This was an action brought by the appellee, Ed. Sanders against the appellant, Tom Davis, in which he sought to recover damages for false imprisonment. The complaint contained two counts, which were as follows: "1st count. The plaintiff claims of the defendant \$3,000 damages for maliciously and without probable cause therefor causing the plaintiff to be arrested and imprisoned on the charge of larceny for to-wit, ten days on to-wit, the 1st day of December, 1899.

"2d count. The plaintiff claims of the defendant \$3,000 damages for maliciously and without probable cause therefor causing the plaintiff to be arrested and imprisoned on the charge of larceny for, to-wit, ten days on, to-wit, the 1st day of December, 1899; and plaintiff avers that he was by reason of such arrest confined in the city prison of Birmingham for ten days; that said city prison was in a filthy, uncomfortable and unhealthy condition; that same was overcrowded, and that the plaintiff was exposed while in said prison to smallpox and confined in said prison where persons were confined who had smallpox, and was deprived the privilege of making bond, wherefore plaintiff brings this suit."

The second count was subsequently amended by adding thereto the following words: "Plaintiff avers that said charge before the commencement of this action has been judicially investigated and said prosecution ended, and the plaintiff discharged."

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The plaintiff introduced evidence tending to show that upon the complaint of the defendant, he was arrested upon a charge of the larceny of a watch; that he was tried in the inferior criminal court of the city of Birmingham, and discharged.

The defendant introduced evidence tending to show that there was probable cause for him to believe that the plaintiff was guilty of the larceny of the watch as charged.

The plaintiff introduced in evidence the testimony of several witnesses that they knew the plaintiff's character and that it was good. To the introduction of these witnesses the defendant separately objected, upon the ground that such evidence was immaterial, irrelevant and illegal, and that the character of the plaintiff was not involved in the issue in this case. The court overruled the objection, and the defendant duly excepted.

Among the charges requested by the defendant, to the refusal to give each of which the defendant separately excepted, was the following: "The jury in this case can not under the evidence find any verdict against the defendant for malicious prosecution."

There were verdict and judgment for the plaintiff, assessing his damages at \$500. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

H. K. WHITE and JOHN LONDON, for appellant.—The complainant in this case was one in trespass to recover damages for false imprisonment; and, therefore, plaintiff could not recover for malicious prosecution.—13 Ency. Pl. & Pr., 427, 428, 429, note; *Ragsdale v. Bolls*, 16 Ala. 62; *Holly v. Carson*, 39 Ala. 345; *Rhodes v. King*, 52 Ala. 272; *Rich v. McInerney*, 103 Ala. 345; 1 Amer. Leading Cases, 209, 211.

B. M. ALLEN, *contra*.—To support an action for malicious prosecution three things must be shown, to-wit, the institution of the prosecution without probable cause, that it was malicious, that it had been determined.—*McLeod v. McLeod*, 75 Ala. 483; *Ib.* 73 Ala. 42; *Foster v. Napier*, 73 Ala. 595.

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Malice may be inferred from the want of probable cause.—*McLeod v. McLeod*, 75 Ala. 483; *Ewing v. Sandford*, 21 Ala. 157; *Blunt v. Black*, 1 Stewart, 39; *Chandler v. McPherson, et al.*, 11 Ala. 916; *Long v. Rogers*, 19 Ala. 321. If no probable cause in fact existed and the defendant failed to use such precaution as a prudent man would use to ascertain that fact, although he acted entirely without malice, yet in such case malice will be inferred for a want of probable cause.—*Long v. Rogers*, 19 Ala. 321.

The previous good character of the plaintiff may be shown as tending to show that the prosecution was without probable cause.—*Woodworth v. Mills*, 61 Wis. 44. Evidence that the defendant had known the plaintiff for some time before the prosecution was commenced raises the presumption that he knew his reputation.—*Ib.* 58.

DOWDELL, J.—The complaint contained two counts, the first being in Code form (No. 19, p. 946, Code,) for false imprisonment; the second being the same, with additional averments of matters showing aggravation. Both counts are in trespass.—*Ragsdale v. Bowles*, 16 Ala. 62; *Sheppard v. Furniss*, 19 Ala. 760; *Holly v. Carson*, 39 Ala. 345; *Rhodes v. King*, 52 Ala. 272; *Rich v. McInerney*, 103 Ala. 345; 13 Ency. Pl. & Pr., 427, 428-9, note 1.

The amendment of the second count by the additional averment that "said charge before the commencement of this action has been judicially investigated and said prosecution ended and the plaintiff discharged," did not change the character of the count from one in trespass for false imprisonment to one in case for malicious prosecution. As amended, it was still wanting in averments essential to constitute a count for malicious prosecution. An averment of the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof, is essential in an action on the case for malicious prosecution. See authorities *supra*. The second count after amendment was wanting in such averment.

The court erred in refusing the second written charge requested by defendant.

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The action being in trespass for false imprisonment, the character of the plaintiff was immaterial, and proof by him of his good character, his character not having been assailed, was wholly irrelevant under the issues, and the court erred in allowing this evidence against the objection of the defendant.

For the errors pointed out, the judgment will be reversed and the cause remanded.

Pioneer Mining & Manufacturing Co. v. Thomas.

Action by Employee against Employer to recover Damages for Personal Injuries.

1. *Master and servant; when employee cannot complain of injuries received; contributory negligence.*—Where an employe is himself the agent through whom the employer undertakes to see that the ways, works, machinery and plant are in proper condition, and the employe undertakes that responsibility, he can not complain of personal injuries sustained by him by reason of defects in the condition of such ways, works, etc.; his negligence contributing proximately to the injuries complained of.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. A. A. COLEMAN.

This action was brought by the appellee, H. Thomas, against the Pioneer Mining & Manufacturing Company, under subdivision 1 of the Employer's Liability Act, and sought to recover damages for personal injuries alleged to have been sustained by the plaintiff, on account of alleged defects in the condition of the ways, works, machinery or plant of the defendant; said injuries being sustained by the plaintiff while engaged in the defendant's coal mines. The damages claimed in the complaint were \$15,000, and it was alleged in the complaint that the injuries were inflicted by reason of a rock falling from the roof of the mine upon the plaintiff. The

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allegations of negligence contained in the complaint were as follows: "Plaintiff alleges that said part of said top or roof fell as aforesaid and plaintiff suffered said injuries and damages by reason, and as a proximate consequence, of a defect in the condition of the ways, works, machinery or plant connected with or used in the said business of defendant, which said defect arose from or had not been discovered or remedied owing to the negligence of defendant, or of some person in the service or employment of defendant, and entrusted by it with the duty of seeing that said ways, works, machinery or plant were in proper condition, viz.: the roof or top of said mine, or the part thereof which fell as aforesaid was loose, or otherwise in danger of falling."

The defendant pleaded the general issue and several special pleas, setting up the plaintiff's contributory negligence. The facts are sufficiently stated in the opinion.

Among the charges requested by the defendant, to the refusal to give each of which the defendant separately excepted, was the general affirmative charge in its behalf.

There were verdict and judgment in favor of the plaintiff, assessing the damages at \$2,500. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

WALKER, TILLMAN, CAMPBELL & PORTER, for appellant, cited *Linton C. Co. v. Persons*, 43 N. E. Rep. 642; *Con. C. & I. Co. v. Case*, 51 Ohio St., 542; *Petaja v. Aurora Min. Co.*, 66 Mich. 951; *Conrad v. Gray*, 109 Ala. 130; *K. C., M. & B. R.R. Co. v. Burton*, 97 Ala. 246; *Howe v. Finch*, 17 Q. B. Div. L. R. 187; *Allen's case*, 99 Ala. 359; *Eureka Co. v. Bass*, 81 Ala. 200.

BOWMAN & HARSH, *contra*, cited *McNamara v. Logan*, 100 Ala. 187; *Railroad Co. v. Thompson*, 94 Ala. 636; *Railway Co. v. Davis*, 92 Ala. 301; *Rolling Stock Co. v. Weir*, 96 Ala. 396; *L. & N. R. R. Co. v. Pearson*, 97 Ala. 211; *Woodward Iron Co. v. Herndon*, 114 Ala. 191.

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MCCLELLAN, C. J.—Action by Thomas against the Pioneer, etc., Co., sounding in damages for personal injuries sustained by plaintiff, an employe of the defendant, through an alleged defect in the condition of the ways, works, etc. of the defendant. The defect counted on and from which the injuries resulted was in the roof of a “heading” leading off from the main slope in defendant’s coal mine. The plaintiff and one Lambie, hirelings of defendant, had been set by the company to drive this heading, and they were at work upon it when rock fell from its roof onto plaintiff, and injured him. We state the matter thus advisedly. We find no conflict in the evidence to the establishment of the facts we have stated. Not only had plaintiff along with Lambie been set to do this work; but all the time up to the falling of the roof they had each been engaged upon it; and at the very moment of the fall of the roof the plaintiff was immediately under the falling rock engaged in an act which was as much a part of the work he had been put to do and was engaged in doing as any thing else he or Lambie had done in carrying out their orders to drive this heading. The evidence is also undisputed that it was the duty of both Lambie and plaintiff in driving that heading to constantly test the roof left above the entry for loose or dangerous rocks or other substances liable to fall from the roof, or ceiling perhaps more accurately, to the floor; and upon finding any such rock or other substance their further duty was to pull down the same or to brace it up by timbers which would securely hold it in place. And, while there were persons in the employment of the company, superior in authority to these men, whose duty it was in a general way to superintend the work and see that it was properly done, these two men, plaintiff and Lambie, were the persons primarily charged by the company with the duty of seeing to it that the roof of this heading was kept in proper and safe condition. This duty was as much upon plaintiff as upon Lambie. Both plaintiff and Lambie within the hour had been specially warned by a superior employe of defendant, and charged to look well to the security of the roof of the heading, the roof which was then dangerous, and this to common observation, and a part of which subse-

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quently fell upon and injured the plaintiff; and, not only so, but the plaintiff had then expressly recognized and accepted this warning and direction as being addressed to him and promised to act in line with it. Yet notwithstanding the duty of plaintiff as well as Lambie to constantly see that the roof of the heading was in proper and safe condition, and notwithstanding they had both been specially charged anew to a diligent performance of this duty less than an hour before the roof fell, both the plaintiff and Lambie negligently failed to perform and discharge this plain duty imposed upon them and undertaken by them primarily for their own protection; and in direct consequence of this failure of duty on the part of plaintiff a large flake of rock fell from the roof on him and inflicted the injuries of which he now complains. That the plaintiff cannot recover on the state of facts we have set forth is altogether clear, and is admitted by counsel for appellee, who in their brief say: "We recognize the rule that if the injured employe is himself the agent through whom the employer undertakes to see that the ways, work, etc., are in proper condition, and the employe undertakes that responsibility, he cannot complain." But it is insisted for appellee that the facts are not as we have stated them, and reliance is had upon the testimony of plaintiff, to the effect that it was Lambie's, and not his, duty to see that the roof of the heading at the particular place from which the rock fell was in proper condition. All this testimony of the plaintiff, however, is patently a mere conclusion of his from his gratuitous and unfounded assumption that he and Lambie were not working together in this heading at the time the rock fell, and that he did not cut the coal from beneath this part of the roof, and hence that it was not his duty to knock down or timber up the rock. The evidence was that when plaintiff and Lambie were put to work at that place, they jointly began to drive the heading at right angles to the slope, that after driving it thus four or five feet plaintiff discovered a threatening condition of the roof, and at that point inserted a timber brace under it. That afterwards they continued to drive this heading two or three feet beyond this

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timber, thus uncovering the faulty roof for that distance beyond the brace. Then plaintiff was directed to cut off the upper corner of this right angle entry so as to make room for a tramway to curve into the entry from the main slope. He had been upon this part of the heading probably a day when he was injured. Meantime Lambie had continued driving the entry, and had cut out the coal from under the rock roof to a distance of eight or ten feet beyond the timber brace above referred to, further uncovering the rock that fell. Neither he nor plaintiff had put in any additional timber, and neither of them had tested the roof, which the evidence shows was easy to be done by striking against it with a pick or hammer. Just before and at the time the rock fell Lambie was working several feet beyond it. Just before it fell plaintiff was working several feet short of it—between it and the slope. Each of them occasionally required a sledge hammer in their work. One such hammer had been provided by the company. This was last used by Lambie and was in that part of the entry where he was working. Plaintiff having occasion for the hammer, it was a part of his work in the heading to go and get it. He was engaged in this particular work, going to fetch the hammer, when the rock fell upon him from the roof. These facts are uncontroverted. It is entirely clear, we think, that they furnish no sort of basis for the deduction and conclusion of the plaintiff as a witness that it was not his duty to see that the roof was in proper condition. He was *working* immediately under the rock at the moment of its fall. Just before its fall he was working several feet from it. So was Lambie. Both he and Lambie had, each in part, cut the coal from under this rock. There is just as much room to say that it was not Lambie's duty to pull down or brace this rock, as there is to say that it was not plaintiff's: There is no room to say that it was not the duty of each and both. We conclude, therefore, that the plaintiff's injuries were due to his own negligence on the uncontroverted proof in the case, and that the court should have given the affirmative charge requested by the defendant.

Reversed and remanded.

[Craig v. Etheredge.]

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138 201**Craig v. Etheredge.***Action of Detinue.*

1. *Pleading and practice; how motions considered on appeal.*—The motion docket of the circuit court is not a record of that court, and a ruling by said court upon a motion spread upon the motion docket can not be reviewed on appeal, unless the motion is incorporated in the bill of exceptions, or the transcript shows that said motion was enrolled upon the records of the circuit court by an order thereof.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. E. B. ALMON.

The appellant, J. N. Craig, brought an action of detinue against the appellee, B. T. Etheredge, in a justice of the peace court. From a judgment in favor of the defendant the plaintiff appealed to the circuit court. In the circuit court the appeal was dismissed on motion made by the defendant. From the judgment dismissing the appeal the present appeal is prosecuted.

The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

D. C. ALMON and KIRK & RATHER, for appellant.

C. M. SHERROD and W. T. LOWE, *contra*.

TYSON, J.—This appeal is prosecuted to review a judgment of the circuit court dismissing on motion an appeal to that court, from a judgment rendered by a justice of the peace. It is true the record contains a copy of a motion upon which the court is supposed to have acted when it rendered the judgment complained of. But it is not shown by the transcript that this motion had been enrolled upon the records of the circuit court by an order thereof. For aught appearing it was

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simply copied into the transcript from the motion docket or from the paper on file upon which it was written. Until an enrollment it is no part of the records of that court and in order to make it a part of the record brought to this court, it must be incorporated in a bill of exceptions. This not having been done we are precluded from considering it. Without it before us, we cannot know upon what grounds the judge acted in rendering the judgment of dismissal.—*Ewing v. Wofford*, 122 Ala. 439, and authorities cited.

Affirmed.

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Action for Malicious Prosecution.

1. *Action for malicious prosecution; admissibility of evidence.*—In an action against the Southern Express Company to recover damages for malicious prosecution, where the principal issue in the case was as to whether the defendant had instigated or encouraged the prosecution of the plaintiff for robbing an express car, inquiries and statements addressed by the detective or special agent of the defendant to a witness, after the plaintiff had been arrested and before his discharge, concerning plaintiff's movements and expenditure of money recently after the robbery, are competent and admissible in evidence as indicating that the defendant employed efforts to obtain evidence for use in said prosecution.
2. *Same; same.*—In such a case, it is competent for the plaintiff on cross examination of the person who swore out the warrant for his arrest, to show that the special agent or detective in the employment of the defendant expressed the opinion to such person that he had sufficient evidence to convict the plaintiff of the robbery charged.
3. *Same; same.*—In such a case, it is competent for the defendant to show that the person, upon whose affidavit the warrant of arrest of the defendant was sued out, before making said affidavit and suing out such warrant, submitted fully and fairly all the facts in regard to plaintiff's guilt to a reputable practicing attorney, and was by him advised that the evidence

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was sufficient to justify plaintiff's conviction; such evidence having a tendency to show that the prosecution of the plaintiff was by such person independent of defendant's influence.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. A. A. COLEMAN.

This was an action brought by the appellee, Robert Eugene Couch, against the Southern Express Company. The complaint as originally filed contained two counts. In the first count the plaintiff sought a recovery of \$20,000 damages for malicious prosecution. In the second count the plaintiff sued to recover \$20,000 for false imprisonment.

The court gave the general affirmative charge in favor of the defendant on the second count. The defendant pleaded the general issue, and the cause was tried upon issue joined upon this plea.

It was shown by the evidence that on May 14, 1898, an express car attached to the train of the Alabama Great Southern Railroad Company was robbed in Sumter county, Alabama; that the Southern Express Company offered a reward for the apprehension and conviction of the persons who robbed said car; that one W. H. Mothershed, on August 12, 1898, made out an affidavit before the probate judge of Sumter county charging the defendant with the robbery, and upon this affidavit a warrant for the arrest of the plaintiff as one of the robbers was issued and was executed in Birmingham; that the plaintiff, after being arrested under said warrant and detained in the Jefferson county jail, was carried to Sumter county, where he remained in jail for thirty or forty days; that he was subsequently discharged on *habeas corpus* proceedings, and has never been required to answer an indictment for train robbery and has never been arrested since upon said charge.

The plaintiff testified as a witness in his own behalf that he had nothing to do with the train robbery and knew nothing about it, and there was other evidence tending to show that the plaintiff was not guilty of said robbery. There was evidence on the part of the plaintiff tending to show that his arrest and prosecution was instigated and encouraged by the defendant through its

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authorized agents. It was shown that P. R. Burns was a detective or special agent in the employ of the defendant, and his duties were to ferret out crimes which were committed against the defendant company. There was some evidence on the part of the plaintiff tending to show that the said Burns, who was investigating the train robbery in question, had authority and power to cause the arrest of persons whom he suspected of offenses committed against the Express Company, and against whom he believed he had sufficient evidence to convict them, and that said Burns counselled and advised the arrest of the plaintiff.

The defendant's evidence tended to show that the defendant had nothing to do with the arrest of the plaintiff; that the prosecution was commenced and the arrest made by Mothershed on his own responsibility, and that the defendant expressly refused to instigate the prosecution or to cause the arrest of the plaintiff. There was other evidence for the defendant tending to show that Burns was without authority to cause the arrest or prosecution of any one suspected of crime against the company.

During the examination of one J. W. Wilson, a witness for the plaintiff, he was asked to state a conversation had between him and P. R. Burns, the defendant's special agent, about the plaintiff Couch. This conversation was shown to be after the arrest of the plaintiff. The defendant objected to this conversation, upon the ground that the declarations of Burns were not competent evidence against the defendant. The court overruled the objection and the defendant duly excepted. The witness stated that Burns asked him if he knew the plaintiff, if he had ever seen him have any money, and when, and if he had ever seen him when he was spending money recklessly, and stated to him in the same conversation that Couch was suspected of the train robbery and had been arrested. The defendant moved to exclude this testimony from the jury, and duly excepted to the court's overruling the motion. The other evidence of the case pertaining to the other rulings of the court upon the evidence, which are reviewed by the court upon the present appeal, are sufficiently stated in the opinion.

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The court at the request of the plaintiff gave to the jury several written charges. The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give the general affirmative charge in its favor requested by it.

There were verdict and judgment for the plaintiff, assessing his damages at \$1,750. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

ALEX. T. LONDON and JOHN LONDON, for appellant. The defendant should have been allowed to prove by Mothershed that before suing out the warrant he solicited a practicing attorney, and after making a full statement to him, was advised that the evidence was sufficient to justify conviction.—*Robertson v. Bradford*, 73 Ala. 116; *Chandler v. McPherson*, 11 Ala. 916; *Huntsville Belt Line v. Corpening*, 97 Ala. 681.

The expression of opinion by the special agent of the defendant that Mothershed had sufficient evidence to convict the plaintiff was not admissible in evidence. 14 Amer. & Eng. Encyc. of Law, 51.

BOWMAN & HARSH, *contra*.—The court did not err in refusing to allow the defendant to prove that Mothershed solicited a reputable attorney, and was advised that there was sufficient evidence to justify a conviction before he swore out the warrant.—Newell on Malicious Prosecution, pp. 318, 319, 320, 321; *McLeod v. McLeod*, 73 Ala. 42; 14 Amer. & Eng. Encyc. of Law, (1st ed.), 53.

SHARPE, J.—An actionable wrong involves liability to one by whom its commission has been incited or encouraged, as well as to its immediate perpetrators. Bishop Non Contract Law, §§ 523, 524. This general principle applies to cases of malicious prosecution. *Porter v. Martyn*, (Tex.), 32 S. W. Rep. 731; 19 Am. & Eng. Ency. Law, 692.

It was possible for the defendant Express Company to have instigated or encouraged the prosecution here

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complained of without ostensibly appearing therein, and for it to have done so through an agent lacking authority to actually install the defendant as the prosecutor. Its special agent Burns, though disclaiming authority to order an arrest and prosecute in its behalf, testified his duties "required him whenever a theft or robbery had been committed, to investigate the matter, and if possible find out who the robbers were and bring them to justice." Inquiries and statements addressed by him to Wilson, if made, as some evidence tends to show, after the plaintiff had been arrested and before his discharge, concerning plaintiff's movements and expenditures of money recently after the robbery, were proper to be proven as indicating that defendant employed efforts to obtain evidence for use in the pending prosecution.

The question asked on the cross-examination of Mothershed as to whether Burns expressed the opinion that he, Mothershed, had sufficient evidence to convict this plaintiff of the robbery, was not subject to the objection. It called for testimony relevant upon the issue towards which the evidence on both sides was mainly directed, viz., whether the Express Company through its agents induced or encouraged Mothershed to prosecute.

But though defendant's conduct may have been calculated to further the prosecution, it was harmless if it did not conduce to that end. If Mothershed prosecuted independently of defendant's influence and solely of his own volition or on the advice of others, defendant is not liable for that action whatever its own efforts or motives may have been. As tending to show he did so, defendant should have been allowed to prove, according to its offer, that he submitted fully and fairly all the facts in regard to plaintiff's guilt to a responsible practicing attorney, and was by him advised that the evidence was sufficient to justify conviction. Direct authority for the admission of such evidence is found in *Chandler v. McPherson*, 11 Ala. 916, where, as here, the plaintiff's theory was that the defendant maliciously caused a third person to commence a prosecution. On the trial of that case the evidence was admitted against the objection to effect that the ostensi-

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ble prosecutor Mrs. Formby made a statement of facts pertaining to the case to an attorney and thereupon was by him advised that she could sustain a prosecution. This court justified the admission of that evidence, saying: "We think the testimony of the legal adviser of Mrs. Formby was admissible, not for the purpose of relieving the defendants from the imputation of malice, for there is no evidence to show that they were cognizant of this advice; but the testimony might have been considered by the jury upon an inquiry whether Mrs. F. was influenced by the counsel of the attorney or the prompting of the defendants. It may be that the defendants first instigated the prosecution, yet the prosecutor may have availed herself of the *locus penitentie*, and would not have become an actor but for the professional advice she received. If this hypothesis is well founded, then the defendants cannot with any propriety, be said to have caused or procured the prosecution of the plaintiff although they may have urged it; and no recovery could be had against them even if proof of malice and want of probable cause were satisfactorily established."

We adopt the opinion quoted, and hold accordingly that in disallowing the evidence of legal advice received by Mothershed there was error for which the judgment must be reversed.

Questions raised as to the sufficiency of the evidence we forbear to discuss, since the evidence may be different on another trial.

Reversed and remanded.

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Bill in Equity to compel Specific Performance of a Contract.

1. *Contract by administrator; when invalid; specific performance.*

One P. died intestate leaving his estate incumbered with a mortgage. Immediately after their appointment, the adminis-

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trators of the estate of said P. entered into a contract with the mortgagee for the purpose and intention of paying off and discharging the said mortgage indebtedness. The contract so entered into, after specifying the indebtedness of the estate to the mortgagee in a large amount and that it was evidenced by promissory notes and secured by a mortgage upon the lands of the estate, and further reciting that the mortgagee had agreed to extend the payment, stipulated on the part of the mortgagors, that they would, for a period of seven years, up to the time of the extension agreed to by the mortgagee, turn over to and pay unto the mortgagee all the rents, incomes and profits from the intestate's estate, which were to be used to pay and satisfy first the advances agreed to be made by the mortgagee from year to year during the period stipulated, and then to be used towards the payment and satisfaction of the mortgage debt due by the intestate to the mortgagee. *Held*: That the administrators were without authority to enter into such a contract; that said contract was not binding upon the estate of the intestate, was invalid and could not be specifically enforced against the administrators in their representative capacity.

APPEAL from the Chancery Court of Pickens.

Heard before the Hon. THOS. H. SMITH.

The bill in this case was filed by the appellants, Winston Jones & Co., a firm composed of W. Jones and W. H. Jones, against the appellees, Mary E. Peebles and Dr. J. Moody, as administratrix and administrator of the estate of E. D. Peebles, deceased, and against Mrs. M. E. Peebles and Dr. J. Moody in their individual capacities. The purpose of the bill and the facts of the case are sufficiently stated in the opinion.

The prayer of the bill was as follows: "The premises considered, the complainants do now ask and pray that a preliminary injunction and restraining order be now issued to defendants and each of them and all and every one acting or pretending to act as agent or otherwise restraining them from withholding said cotton from complainants; and enjoining and restraining them and each of them and each and every person acting or pretending to act for them as agent or otherwise, from selling or disposing of said cotton otherwise than in accordance with the terms and provisions of said contract with com-

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plainants, and enjoining them from committing or doing any other act in violation of their said contract without the consent of complainants, and commanding defendants and each of them to specifically perform their said contract and to ship said cotton to complainants in accordance with their said contract; and that on final hearing a decree be entered making said preliminary injunction final and perpetual. And they also ask for all such further orders, processes or decrees as the nature of the case may at any time require in its further progress."

The contract which was sought to be specifically enforced was in words and figures as follows: "State of Alabama, County of Pickens. Agreement entered into by Winston Jones & Co. and Dr. J. Moody, Admr., and Mrs. Mary E. Peebles as administratrix of Emory B. Peebles, deceased, this 13th day of January, 1896, witnesseth, that whereas the estate of the said E. B. Peebles is indebted to Winston Jones & Co. in the sum of twenty-seven thousand one hundred and twenty-five 29-100 dollars as evidenced by his several promissory notes and secured by mortgage on the 10th day of July, 1895, and of record in the probate office of said county with conditions therein set forth; and whereas Winston Jones & Co. are willing to aid the said administrators in consummating the terms and provisions of said mortgage, and in the event the estate is not able to meet the payments as they become due, the said Winston Jones & Co. agree to extend the unpaid amounts under said mortgage and any balance so unpaid to be carried over for the next year, and so on as to such extensions from year to year until January 1st, 1903. Winston Jones & Co. agree further to advance to the administrators of said estate of Peebles a reasonable amount of cash and supplies, say three thousand dollars per year, during this time to enable them to carry on the business, the said Winston Jones & Co. to have a mortgage on all the crops of cotton, cotton seed and corn raised by said administrators on all the lands owned by the estate, and also on the lands owned by Mrs. Mamie E. Peebles deeded to her by E. B. Peebles during said seven years, all the cotton to be shipped to

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said Winston Jones & Co., Mobile, for sale by them in the usual way, proceeds to be applied to the payment, first of the new advance to make the crops, and any surplus to be applied to the old mortgage aforesaid. Now, in consideration of the foregoing, and it being to the interest of said estate, as well as Mrs. Mamie E. Peebles, the said Mrs. Mamie E. Peebles agrees to turn over to the administrators of said estate of E. B. Peebles the use and control of all the property, real and personal, deeded to her by E. B. Peebles on the 6th day of December, 1895, and of record in the probate office of said county, free of rents until the first of January, 1903, and all said rents, incomes and profits to be used by said administrators to pay and satisfy the said mortgage debt of E. B. Peebles to Winston Jones & Co., all taxes on the property owned by Mrs. Peebles that was deeded to her by E. B. Peebles to be paid out of the income of all the estate property until the said debt to Winston Jones & Co. is fully paid. In the event Dr. Moody should resign, or in any manner cease to manage the said business, then it is agreed that Mrs. Peebles and Winston Jones & Co. shall select a suitable person to conduct the business in his stead to a final consummation as aforesaid, or the representatives of Mrs. Peebles and of Winston Jones & Co. may so act in such selection. Witness our hands this the day and year first above written. Executed in duplicate. [Signed] Winston Jones & Co., J. Moody, Mamie E. Peebles."

On the final submission of the cause on the pleadings and proof, there was a decree rendered, the substance of which is sufficiently stated in the opinion. From this decree the complainants appeal, and assign the rendition thereof as error.

There were also cross assignments of error made by the appellees, but the record does not show that any cross-appeal was taken, nor is there shown any agreement between the parties for the appellees to make cross assignments of error, nor is there any joinder by the appellants in the cross assignments of error.

A. BOGLE and PETTUS & PETTUS, for appellants.—The jurisdiction of a court of equity to grant the relief

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of specific performance of contracts is old and well settled. It is founded on the just principle that men should be required to act in good faith towards each other in their business transactions; and that they should not be permitted to violate contracts solemnly entered into, when it would be to the detriment of the other contracting parties for them to do so. When a proper case is presented for its exercise the party injuriously affected by a breach of the contract, is entitled to the relief as a matter of right; as much so as they would be entitled to a judgment in an action at law for damages for the breach.—*Bogan v. Daughdrill*, 51 Ala. 314; *Chambers v. Ala. Iron Co.*, 67 Ala. 358; 3 Pom. Eq. Juris., § 1404; 1 Story's Eq. Juris., §§ 715, 717, 718, 742.

It will be granted in every case where an action at law for damages would not afford complete relief, (*Kirksey v. Fisk*, 27 Ala. 386,) or where compensation in damages for the breach would not furnish a complete and satisfactory remedy, (*Johnson v. Brooks*, 93 N. Y. 338), or where the remedy at law is for any reason doubtful uncertain or inadequate, (*Casey v. Holmes*, 10 Ala. 785), or where an action at law in damages for a breach would not put the parties in a situation as beneficial to them as if the agreement had been specifically performed, (1 Story's Eq. Juris., § 716, note 2, page 703; 3 Pom. Eq. Juris., page 441, note 2), or where the nature of the case is such that a performance in specie alone will answer the ends of justice. (*Cuthcart v. Robinson*, 5 Peters 264), or where there are special circumstances that operated as an inducement to the making of the contract which a court of law could not consider in an action in damages for a breach. *Kirksey v. Fike*, 27 Ala. 386; *Johnson v. Brooks*, 93 N. Y. 338; 3 Pom. Eq. Juris., 444.

This was a contract which Jones & Co. would have had a right to enforce against Peebles. It was fair and just and conferred advantages and benefits upon Jones & Co. for which they could have no adequate remedy by an action in damages at law for a breach, and for which they would have been entitled to a de-

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cree for specific performance against E. B. Peebles in case he failed to comply with its terms. It was, therefore, binding upon his administrators.—*Hayes v. Hall*, 4 Port. 385; *Brewer v. Brewer & Logan*, 19 Ala. 489; *Chambers v. Ala. Iron Co.*, 67 Ala. 358; *Strange v. Watson*, 11 Ala. 324; *Jenkins v. Harrison*, 66 Ala. 345; *Meyer v. Mitchell*, 75 Ala. 475.

The administrators did nothing under the contract, and would not be doing anything in performing it which they were not authorized under the laws of Alabama. The only thing the administrators did under the contract, that in any way affected the rights of the estate of E. B. Peebles, was to rent out the lands and mules belonging to the estate. The testimony is clear and positive that the lands and mules were all rented out to tenants. This the administrators had a perfect right to do under the statutes of Alabama, without any order of court.—Code of 1886, § 2102. The power to rent involves the duty to do so, whenever it becomes apparent to the administrators that it will be necessary in order to pay the debts of the estate.—*Clark v. Knox*, 70 Ala. 622.

Where administrators come into possession of an estate encumbered with a mortgage, it is their duty to rent the lands and apply the proceeds to the payment of the mortgage, and it is not necessary to obtain an order of court to do so.—*Mayer & Co. v. Taylor & Co.*, 69 Ala. 405; *Patapsco Guano Co. v. Ballard*, 107 Ala. 716.

WILLETT & WILLETT, *contra*.—The contract of January 13, 1896, entered into by and between the administrators of E. B. Peebles and Winston Jones & Co., is an illegal contract, as the administrators had no authority to execute the same. They should have gotten an order of the court for its execution, and having failed to do this, it is unwarranted in law and, therefore, illegal and courts of equity will not enforce specifically an illegal contract.—*Waterman on Specific Performances*; 2 Brickell's Dig., 692.

Where an administrator transferred a certain portion of the undivided assets of an estate in compromise of a pending suit the court refused specific performance,

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as the law prohibited private sales by executors and administrators, and held the contract was violative of law and incapable of being enforced.—*Bogan v. Campbell*, 30 Ala. 276.

The doctrine applying in such cases is *in pari delicto potior est conditio possidentis*.—*Bogan v. Campbell*, *supra*; *Brantley v. West*, 27 Ala. 542

A void contract will not be specifically enforced. *Deal v. Hair*, 18 Ala. 748; *Evans v. Kittrell*, 33 Ala. 447; *Smith v. Johnson*, 37 Ala. 633.

Specific performance is not a matter of right, and courts of equity are invested with a sound discretion to grant or withhold relief as may seem just and equitable. If unconscionable and unjust they will deny relief. *Irwin v. Bailey*, 72 Ala. 467; *Moon v. Crowder*, 72 Ala. 79; *Derrick v. Monette*, 73 Ala. 75.

The jurisdiction is carefully and cautiously exercised, and specific performance will not be decreed unless it is strictly equitable in enforcing the contract the parties made.—*Bogan v. Daughdrill*, 51 Ala. 312; *Ellet v. Wade*, 47 Ala. 456; *Hurst v. Thompson*, 73 Ala. 158.

If the contract is founded on fraud, imposition, mistake or grave misapprehension it will not be enforced; nor when from a change of circumstances or otherwise it would be unconscientious.—*Ellet v. Wade*, 47 Ala. 456; *Daniel v. Collins*, 57 Ala. 625.

DOWDELL, J.—The appellants filed their bill in the chancery court of Pickens county for the purpose of enforcing the specific performance of a contract made and entered into by them under the firm name of Winston Jones & Co., on the 13th day of January, 1896, with the appellees, Mamie E. Peebles and Dr. J. Moody as the administrators of the estate of E. B. Peebles, deceased. In addition to the special prayer, the bill contained the general prayer for relief. Upon the final hearing on the pleadings and proof, the chancellor denied the relief sought against the respondents by the bill in their representative character, holding that they as administrators were without authority and powerless to bind

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the assets of the estate of their intestate by entering into said contract, but under the general prayer, granted only partial relief against the respondent, M. E. Peebles. From this decree the present appeal is prosecuted. While error is also complained of in the decree in the directions for the stating of the account between the complainants and respondents under the order of reference for that purpose, the main question involved in the controversy on this appeal is that of the authority and power of the administrators, as such, to enter into the contract sought to be specifically enforced, and its consequent validity.

Pertinent to this question, the bill and the facts in the case show that E. B. Peebles, respondents' intestate, was the owner of a large quantity of land in Pickens county, and during his life, for many years, and up to the time of his death, farmed extensively, and also merchandised, during which time he had business transactions with the complainants, Winston Jones & Co., who did a commission business in the city of Mobile, and who were the said E. B. Peebles' commission merchants. In March, 1895, the said E. B. Peebles and Winston Jones & Co. had a settlement of accounts between said Peebles and Jones & Co., in which it was ascertained that the said Peebles was largely indebted to the said Jones & Co. A written agreement was then entered into between them, in which it was agreed that the said Peebles would upon certain conditions stated in said agreement execute a mortgage on a large amount of land and personal property, which he then owned, to said Winston Jones & Co. to secure his indebtedness to them. Pursuant to said agreement, all the terms and conditions of which having been complied with by the said Winston Jones & Co., the said E. B. Peebles did on the 10th day of July, 1895, make and execute a mortgage to the said Winston Jones & Co., a copy of which is made an exhibit to the complainants' bill. In December, 1895, the said E. B. Peebles died, leaving his estate encumbered with said mortgage. In January, 1896, the respondents Dr. J. Moody and Mamie E. Peebles took letters of administration on the estate of the said E. B. Peebles, deceased, and immediately qualified and en-

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tered upon the discharge of their duties as such administrators, and on the 13th day of January made with Winston Jones & Co. the contract in question. The facts show that it was the purpose and intention of the parties, in entering into said contract, to pay off and discharge said mortgage indebtedness from E. B. Peebles to Winston Jones & Co., with the rents, income and profits from the mortgaged property, and thereby save to the estate of the said E. B. Peebles, deceased, and to his heirs, the land and other property covered by the mortgage (and to that end and for that purpose, the said Mamie E. Peebles pledging the rents and income from her individual estate). The facts show that the contract was just and fair and reasonable in its terms. In accordance with its provisions, the cotton grown and raised on the lands for the year 1896, was shipped to Winston Jones & Co. at Mobile, and by them sold and the proceeds applied under the terms of the contract, and the contract otherwise, in all of its terms, was carried out by all of the parties for the year 1896. The facts further show that Winston Jones & Co. continued for the next year, 1897, to carry out said contract in good faith, and have all along performed their part, until they were prevented from further performance by the respondents; that the respondents received all of the benefits under the provisions of said contract in growing and raising the crop of 1897 in the way of advances in money and supplies to the respondents and their tenants on said lands, made by said Jones & Co. in accordance with the terms of the contract, but that the said Mamie E. Peebles, respondent, after said crop of 1897 had been so grown and gathered, refused to ship said crop to said Jones & Co. according to the contract, and wholly refuses to further carry out and perform said contract. The facts further show that under the agreement of settlement of March, 1895, between the said E. B. Peebles and Winston Jones & Co. and under the mortgage of July 10, 1895, executed pursuant to said agreement, as well as under the contract of January 13, 1896, entered into between the complainants and respondents for the purpose of paying off and discharging said mortgage in-

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debtedness and thereby preserving the lands under said mortgage to the estate of their intestate, certain benefits were to accrue, and would accrue to Winston Jones & Co. in the performance of said contract, which operated as an inducement for entering into the same, and for such as no adequate and just compensation could be had in an action at law, in the assessment of damages, on a breach of the contract.

With this preliminary statement of the facts as shown in the record we proceed to the discussion of the propositions of law applicable thereto and which we think control in the case.

The doctrine of equity jurisdiction to compel the specific performance of contracts is well settled. It rests upon the just principle that men should be required to act in good faith towards each other in their business transactions; and that they should not be permitted to violate solemn contracts entered into, when it would be to the detriment of the other contracting parties for them to do so. When a proper case is presented for its exercise the party injuriously affected by a breach of the contract, is entitled to the relief as a matter of right; as much so as they would be entitled to a judgment for damages in an action at law for the breach. *Chambers v. Ala. Iron Co.*, 67 Ala. 358; *Bogan v. Daughdrill*, 51 Ala. 314; 1 Story Eq. Jur., §§ 715-717-717a, 742; 3 Pom. Eq. Jur., § 1404. What will constitute a proper case for the exercise of equity jurisdiction for enforcing the specific performance of a contract, in general, is determinable upon the inadequacy of any remedy in a court of law to fully meet the ends of justice. In the following cases it seems to be clear upon authority, that the jurisdiction will obtain and relief be granted, viz.: Where the remedy at law is for any reason doubtful, uncertain, or inadequate.—*Casey v. Holmes et al.*, 10 Ala. 785. Or, where an action at law in damages for a breach would not put the parties in a situation as beneficial to them as if the agreement had been specifically performed.—1 Story Eq. Jur., §§ 716 *et seq.*; 3 Pom. Eq. Jur., p. 441, note 2. Or, where the nature of the case is such that a performance alone will answer the ends of justice.—*Cathcart v. Robinson*,

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5 Peters, 264. Or, where there are special circumstances that operated as an inducement to the making of the contract which a court of law could not consider in an action in damages for a breach; and in every case where an action at law for damages would not afford complete relief.—*Kirksey v. Fike*, 27 Ala. 386; *Johnson v. Brooks*, 93 N. Y. 338; 3 Pom. Eq. Jur., p. 444.

The facts and circumstances in the present case as shown by the record, bring the case fairly within the principles above stated. They show that the complainants were commission merchants and cotton factors in the city of Mobile; that their business and profits in this particular consisted in advancing money and supplies to merchants and farmers, to enable them to grow crops and buy cotton, in order that they, Jones & Co., might secure the handling and sale thereof; and for which advances and supplies and sales of cotton they received a commission from the parties dealing with them. The facts also show that Jones & Co. were largely interested as owners in the steamboat company on the Bigbee river, by which this particular cotton was shipped to Mobile, Ala., and on account of which they received a profit from freight charged for shipping said cotton. They were also interested in the compress and warehouses in Mobile, by which the cotton would be handled, and in the insurance companies by which the cotton would be insured, sharing in the profits arising from these sources. All of these profits being of such character that they could not be considered the measure of damages for a breach of the contract in an action at law, yet were advantages accruing to Jones & Co. from the contract which induced them to enter into it. Apart from the consideration of the question of the power of the respondents in their representative character to make the contract, the contract in its terms and under the peculiar circumstances of the case, such as clearly calls for the exercise of the jurisdiction and power of a court of equity for its specific performance.

Did the administrators exceed their powers and duties as such, under the law, in entering into the contract?

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Recurring to the mortgage of E. B. Peebles, deceased, to Winston Jones & Co. of July 10, 1895, and for the purpose of paying off and discharging which, the contract of January 13, 1896, was entered into by the respondents, it will be seen that said mortgage contained a contract out of which other and future advantages were to accrue to both Jones & Co. and E. B. Peebles. After describing the property covered by the mortgage, and providing the manner of sale in case of default, the instrument continues as follows: "and further, on considerations as aforesaid, I do hereby sell and mortgage to Winston Jones & Co. all the crops of cotton, corn, fodder, peas, potatoes, hay, etc., which I may grow, or have grown on said lands or any other lands in said county and State which I may cultivate or cause to be cultivated, and I obligate myself to deliver them at convenient warehouses on the river to be shipped to them in Mobile, and there by them sold in the usual manner on account of the above indebtedness, from year to year, all such crops of cotton as I may grow or cause to be grown; other crops to be disposed of so as to promote the best interests of the parties to this instrument as may be from time to time agreed upon, or sold as the other property is provided to be sold." Under the facts and circumstances Winston Jones & Co. would have been entitled to a specific performance of this contract against E. B. Peebles, on a bill filed for that purpose. This contract was, therefore, binding on his representatives.—*Hays et al. v. Hall et al.*, 4 Port. 385; *Brewer v. Brewer & Logan*, 19 Ala. 489; *Chambers et al. v. Ala. Iron Co.*, 67 Ala. 358; *Strange v. Watson*, 11 Ala. 324; *Jenkins v. Harrison*, 66 Ala. 345; *Meyer v. Mitchell*, 75 Ala. 475, 480. By the contract of January 13, 1896, the administrators evidently intended to carry out the contract contained in the mortgage of their intestate to Jones & Co. of July 10, 1895, and this was not beyond their power and duty, when in order to its performance they had only to rent out the lands of the estate. They had the authority under the statute to rent the decedent's lands, and this without an order of the court, and when the interests of the estate required it, to rent privately; the statute imposing the

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duty upon them when lands are rented privately, to report such renting to the probate court.—Code, 1896, § 154. In *Clark v. Knox*, 70 Ala. 622, it was said by this court, speaking through BRICKELL, C. J.: “The statute (Code of 1876, § 2446),” same as section 154 of the present Code, “clothes an executor or administrator, with the same power to rent, publicly or privately, the lands of the testator or intestate. The power involves the duty, and if there is neglect to exercise it, he is answerable for the loss resulting, as he is for loss from neglect of any other duty with which he is charged.”

The bill prays a specific performance of the contract as to the two hundred and seventy-eight bales of cotton now stored in the warehouse of the respondent Mamie E. Peebles. It is exhibited against the respondents in their individual as well as their representative capacity. The facts show that this cotton was grown and raised by tenants during the year 1897, on the lands of the estate and lands of the respondent Mamie E. Peebles, and was received by the respondents from such tenants and stored in said warehouse. Of the two hundred and seventy-eight bales, about one hundred and twenty-five bales were raised on the lands of Mrs. Peebles, and the remainder, about one hundred and fifty-three, on the lands of the estate. Of the one hundred and fifty-three bales grown on the estate lands, about forty-five bales were due for rent, and the remainder, about one hundred and eight, were due for supplies and advances made to the tenants to enable them to make the crop on the rented lands of the estate. There can be no doubt of the validity of the contract as against Mrs. Peebles in her individual capacity, and of the right of the complainants to a specific performance against her as to the cotton grown on her individual lands, and this, the chancellor decreed, but denied relief sought as to the remainder of the cotton, holding that this cotton constituted assets of the estate and that the contract was incapable of enforcement as to it, for the reason that the administrators were without authority to make the contract.

We think it quite clear that the cotton raised by the tenants on the lands of the estate, in excess of the

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rents, was the property of the tenants, and independent of any contract as to advances, constituted no part of the assets of the estate. If the cotton due from the tenants for advances, became a part of the assets of the estate, it was by virtue of the contract which is the foundation of this suit, since the supplies and advances so made were obtained through the contract. To hold that this cotton constituted a part of the assets of the estate, would be in effect a ratification of the contract. The advances to make this cotton came from Winston Jones & Co. under the contract. It would be wholly unjustifiable to ratify the contract as to the estate, and at the same time repudiate it as to Winston Jones & Co. In equity the cotton representing the advances made to raise and grow the same, and which was received by the respondents from the tenants on the debt for such advances, was purchased with the money of Winston Jones & Co., and they, the respondents, should be estopped to deny the validity of the contract under which the advances were made and obtained, and by reason of which this cotton came into their possession. And this is true, whether they hold this cotton in a representative or individual capacity.

As to the forty-five bales representing the rent of the estate lands, and which were assets belonging to the estate, it became and was the duty of the administrators under the law, independent of any express contract entered into by them, in their representative capacity, to apply this rent cotton on the mortgage debt, which encumbered the lands,—it was their duty to rent out the lands for the purpose of discharging this mortgage debt with the rents, if it was to the advantage and interest of the estate for it to be paid off in that way. *Clark v. Knox*, 70 Ala. 622; *Patapsco Guano Co. v. Ballard, Adm.*, 107 Ala. 710. If, then, it was their duty, and they had the authority under the law to rent out the lands and so apply the rents, it would seem to logically follow, that they could in their representative character make a valid and binding contract with the mortgage creditor, to apply the rents to accrue from the encumbered lands, in discharge of the encumbrance.

Our conclusion, therefore, is, that the contract of January 13, 1896, was valid and binding and capable

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of enforcement against the respondents in their individual capacity as to the cotton grown on the individual lands of Mrs. Peebles, and the cotton received from tenants for advances, that was grown on the estate lands, since such cotton constituted no part of the assets of the estate. And under the principles above stated, the contract was valid and binding and capable of enforcement against the respondents in their representative character as to the rent cotton arising from the encumbered lands.

The foregoing expresses the views of the writer, and in which Justice TYSON concurs. But the majority of the court hold that the respondents were without authority as administrators to enter into the contract of January 13, 1896, and for that reason the same is invalid, and cannot be specifically enforced against them in their representative character.

We cannot consider appellees' cross-assignments of errors, since no appeal was taken by the appellees, nor is there any consent in writing by the appellants indorsed on transcript, nor joinder by appellants in the cross-assignments. See Rule 3 of Practice, page 1187 of the Code, and authorities cited under this rule. It may, however, be stated here, that as to the defense of non-claim set up by the respondents in their answer, on precisely the same evidence offered in this case it was held in the case of *Jones et al. v. Peebles*, 130 Ala. 269; 30 So. Rep. 564, that there had been sufficient presentation of the claim under the statute.

It follows that the decree of the chancellor must be affirmed.

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Action of Assumpsit.

1. *Action by administrator to recover purchase price of lands; sufficiency of complaint.*—In an action by an administrator to recover the purchase price of lands belonging to the intestate's

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estate, where, by the averments of the complaint, it is shown that the sale of the land was a judicial sale made through the plaintiff, as administrator, under a decree of the probate court, and that such sale had been reported to the court rendering the decree, as was contemplated by the statute under which the sale was had (Code, § 2154), a plea setting up that the sale was at public auction, and that a memorandum of it was not made by the auctioneer, etc., presents no answer to the complaint and is subject to demurrer.

2. *Same; same.*—In such a case, the sale being a judicial one, a plea setting up the misrepresentation of the administrator while acting as the agent of the court in making the sale, as to the quantity of the land sold, presents no defense to the action, the maxim of *caveat emptor* applying to such a sale.
3. *Same; same.*—In such a case, a plea averring that the sale referred to in the complaint was never confirmed by the probate court ordering said sale, and for this reason he never became liable to plaintiff on account of said purchase, is bad and presents no defense to the action.

APPEAL from the Circuit Court of Etowah.

Tried before the Hon. J. A. BILBRO.

This action was brought by the appellant, P. E. Culli, as administrator of the estate of D. B. Horton, against the appellee, J. M. House.

A demurrer was sustained to the original complaint, and thereupon the plaintiff filed an amendment to the complaint, which was in words and figures as follows: "The plaintiff as such administrator further claims of the defendant the sum of one hundred dollars as damages with interest from September 9th, 1899, for that, heretofore, to-wit, plaintiff avers that he is the administrator of the estate of D. B. Horton, who died intestate, and who was at the time of his death a resident citizen of Etowah county, Alabama, owning real and personal property in said county; that plaintiff, as such administrator, on or about June 3d, 1899, filed his petition in the probate court of said county praying to sell said lands for the payment of debts of said estate; that on the hearing of said petition by said court the said lands of said estate were decreed to be sold at public outcry to the highest bidder; that said lands should be sold for one-third cash and a credit of one and two years for the deferred pay-

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ments, the purchaser to execute his two notes for 13 each of said purchase price; that due and legal notice was given as required by law; that in pursuance of said decree and notice and by authority of said court in him vested for said purpose, he exposed for sale said lands; that at said sale the defendant J. M. House did become the purchaser and highest bidder for a portion of said lands for the sum of one hundred and sixty-three dollars; that defendant, though knowing the terms of said sale, failed and refused and does fail and refuse to comply with the terms of his purchase, but has wholly failed to do so; that plaintiff reported said sale to said court, showing said failure of said defendant to so comply with his purchase; said court ordered and decreed that plaintiff again sell said land, which on due legal notice was done, on, to-wit, December 23, 1900; that said last sale was reported to and confirmed by said court before commencement of this suit; that the highest bid received was \$105, and said last sale was on same terms as the first sale; plaintiff avers that by reason of said resale plaintiff had to re-advertise said lands, incurred additional court costs to the amount of \$10 in the probate court, lost the difference between the first sale and the second sale, and incurred attorney's fees, to-wit, \$20, for said resale, hence which amounts plaintiff claims in this suit."

The defendant pleaded the general issue and the following special pleas: "2. Defendant for further plea says that sale referred to by plaintiff was at public auction and no memorandum was made by the auctioneer, his clerk or agent showing the price at which the land was sold, the terms of sale, the name of the person on whose account the sale was made and the name of the purchaser.

"3. Defendant for further answer to complaint of plaintiff says that at the time said sale was made plaintiff represented to defendant that the land in question contained about one acre of ground, and defendant relying on said representation bid off said land at said sale. Defendant avers that said representation was wholly untrue, and that said lands contained less than

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one-half an acre, and for this reason defendant refused to take said land.

"4. Defendant for further plea says that the sale referred to in plaintiff's complaint was never confirmed by the probate court ordering the sale of said lands by plaintiff, and that for this reason he never became liable to plaintiff on account of the matter complained of.

"5. Defendant for further plea says that at the time said sale was made of said lot to defendant, plaintiff represented that there was on the lot being sold a house with four rooms on the same; that defendant relying on said representation bid off said lands at said sale, and defendant avers that said representation was wholly untrue and that the house and grounds contained only two rooms.

"6. Defendant for further plea says that at the time said sale was made of said lot to defendant plaintiff represented that there was a three-room house on said lot, and that defendant relying on said representation bid off said lands at said sale, and defendant avers that said representations were wholly untrue, and that the house on said lot contained only two rooms."

To the second plea the plaintiff demurred upon the following grounds: 1. Said plea is no answer to the complaint, because the complaint shows on its face that it is a legal sale. 2. Because the sale shown in the face of the complaint is a judicial sale and needs a confirmation before sale is completed.

To the third, fifth and sixth pleas the plaintiff demurred upon the following grounds: 1. Because the complaint shows on its face that it is a judicial sale of which due notice was given, and it is no answer to said complaint and that the amount sold was only one-half acre in place of one acre. 2. The defendant had no right to rely on statements of plaintiff. 3. The defendant has no right to refuse to comply with the terms of sale. 4. Said plea is no answer to the complaint in that the complaint shows on its face that the sale was a judicial sale.

To the fourth plea the plaintiff demurred upon the following grounds: 1. Because it is immaterial whether the sale was or was not confirmed by the pro-

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bate court. 2. The complaint shows on its face that defendant failed to comply with his bid, yet complains because said sale was not confirmed. 3. The sale not being confirmed is no answer to the complaint. 4. Said plea is no answer to the complaint which shows on its face a judicial sale, and a non-compliance of defendant, and, therefore, could not be confirmed.

The demurrer to the second, third, fifth and sixth pleas were, by the court, overruled, and the demurrers to the fourth pleas were sustained.

Upon the trial of the cause there was judgment in favor of the defendant. Under the opinion on the present appeal it is unnecessary to set out the facts of the case in detail.

The plaintiff appeals, and assigns as error the rulings of the court upon the pleadings, and the several rulings upon the evidence to which exceptions were reserved.

P. E. CULLI, for appellant.—The sale by the plaintiff to the defendant of the intestate's lands was a judicial sale, and the second plea setting up the statute of frauds presents no defense.—*Howison v. Oakley*, 113 Ala. 237.

In a judicial sale the court undertakes to sell only the title such as it is, of the parties to the suit and nothing more.—17 Am. & Eng. Ency. Law (2d ed.), 1010.

It is well established as a general rule that where property is sold at a judicial sale, there is no warranty as to either the title or the condition of the property. 17 Am. & Eng. Ency. Law, 1010, 1011; *Perkins v. Winter*, 7 Ala. 855; *Burns v. Hamilton*, 33 Ala. 210; *Hickson v. Lingold*, 47 Ala. 449; *Bland v. Bowie*, 53 Ala. 152; *Fore v. McKenzie*, 58 Ala. 115; *Boykin v. Cook*, 61 Ala. 472; *Lovelace v. Webb*, 62 Ala. 271.

The purchaser has no right to rely upon the representations of the agent or officer making the sale.—*Fore v. McKenzie*, 58 Ala. 115.

The purchaser must inquire for himself.—*Fore v. McKenzie*, 58 Ala. 115.

The purchaser must see for himself that he is getting what he considers that he is bargaining for, as the

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rule of *caveat emptor* applies in full force.—*Worthington v. McRoberts*, 9 Ala. 297; *Burns v. Hamilton*, 33 Ala. 210; *Hickson v. Lingold*, 47 Ala. 449; *Bland v. Bowie*, 53 Ala. 152; *Fore v. McKenzie*, 58 Ala. 115; *Boykin v. Cook*, 61 Ala. 472; *Lovelace v. Webb*, 62 Ala. 271; *Turner v. Teague*, 73 Ala. 554; *Ezzell v. Brown*, 121 Ala. 150.

BURNETT, HOOD & MURPHREE, *contra*, cited *Hutton v. Williams*, 35 Ala. 503; *Rice v. Richardson*, 3 Ala. 429; *Atwood v. Wright*, 29 Ala. 346; *Fore v. McKenzie*, 58 Ala. 115.

MCLELLAN, C. J.—Upon every pertinent consideration and by all ruling authorities the sale of the land to J. M. House made through Culli as administrator, etc., by the probate court of Etowah county under its decree to that end, was a judicial sale. The complaint showed that the sale was within the letter and spirit of section 2154, and that it had been reported to the court rendering the decree of sale, as therein contemplated. Plea 2 setting up that the sale was at public auction and that no memorandum was made of it by the auctioneer, etc., was no answer to the complaint, and the demurrer to it should have been sustained.

The sale being a judicial one, the maxim of *caveat emptor* applies, and the purchaser cannot defend an action at law for the purchase money because of misrepresentations of the administrator while acting as the agent of the court in making the sale.—*Fore, Admr., v. McKenzie*, 58 Ala. 115. Pleas 3, 5 and 6, therefore, presented no defense to this action.

Plea 4 was also bad. It was not necessary for the sale to be confirmed to support an action under section 149 of the Code. The default of the purchaser rendered a confirmation of the sale legally impossible. Code, §§ 175, 177.

On another trial, with the pleas to which we have averted eliminated from the case and the evidence confined to proper issues, the plaintiff, on adducing the evidence introduced by him on the first trial, will be entitled to the affirmative charge with hypothesis.

Reversed and remanded.

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140 208**Brown et al. v. Fowler.***Action against Endorsers of Promissory Note.*

1. *Action against endorser of promissory note; sufficiency of complaint.*—In an action by the payee of a note against endorsers thereon, a complaint which alleges that the defendants endorsed the note, setting the same out *in hæc verba*, and it is then averred that in the interim between the maturity of the note and the first term of the court to which suit might have been brought, the defendants had requested the plaintiff not to bring suit against the maker of the note, and expressly promised to pay the debt evidenced by said note, “thereby inducing plaintiff to delay bringing suit” against the maker of said note, and further alleges the institution of the suit against the maker of the note, the recovery of judgment, the issuance of execution upon said judgment and the return thereof “no property found,” is sufficient as a complaint by the payee of the note against the endorsers thereon, and is not subject to demurrer.
2. *Same; same.*—It is no objection to such a complaint that it avers the institution of a suit against the makers of the note, the recovery of judgment therein, the issuance of execution thereon and its return of no property found, and such allegations are not subject to be stricken upon motion based upon the ground that they were immaterial and impertinent to any issue in the case.
3. *Action by payee of note against endorsers; not necessary for promise of endorser to be in writing.*—The promise of the endorser of a note to pay the same, by which the plaintiff is induced to delay bringing suit to the first term of the court to which suit could be brought, in order to constitute an excuse for not bringing suit to such term of the court, as provided by statute (Code, § 897, subd. 7), need not be in writing; all that is necessary being an express promise on the part of the endorser to pay the debt.
4. *Endorsement of note; not necessary for the consideration to be expressed.*—The act of endorsement, either in blank or in full, without qualification, forms a new contract between the endorser and the endorsee, and is *prima facie* evidence between the immediate parties of a full and valuable consideration;

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and the failure of consideration is a matter of defense, the burden of proving which rests upon the one who disputes such consideration.

5. *Action against endorsee of note; sufficiency of plea.*—In an action by the payee of a note against an endorser thereon, where the complaint alleges that suit was not brought against the maker to the first term of the court to which it could be brought, after the maturity of the note, but that the plaintiff was induced to delay the institution of suit by the promise of the defendant as endorser to pay said note, a plea which sets up that the "alleged promise of the defendant upon which plaintiff relies for recovery as against these defendants, was wholly without consideration," is insufficient as a defense and subject to demurrer.
6. *Action against endorsers of note; admissibility of evidence.*—In an action against two endorsers of a note, where the allegations of the complaint are sufficient to show that each of the defendants separately endorsed said note, any evidence on the part of either of them that he made the several and individual promises to pay the debt is good as against him, and evidence tending to show that each defendant recognized the debt as his individual obligation and made such promises is admissible in evidence.
7. *Same; same.*—In an action by the payee against an endorser of a note, where it is alleged in the complaint that the defendants had promised to pay said indebtedness, and by reason of such promise the plaintiff was induced to delay the institution of the suit against the maker until after the first term to which it could have been brought, evidence of the solvency of the maker of the note at the time it fell due, and the amount of property owned by the maker and its value, is entirely irrelevant to any issue in the case and is inadmissible.
8. *Same; same.*—In an action by the payee of a note against the endorsers thereon, where it is alleged in the complaint that the defendants had promised to pay said indebtedness, and by reason of such promise the plaintiff was induced to delay the institution of the suit against the maker until after the first term of the court to which it could have been brought, and such promise is denied by the plaintiffs, and it is shown that the maker of the note was a corporation, it is competent for the plaintiff to show that the defendants, who were the endorsers of said note, owned a majority of the capital stock of the corporation which was the maker of said note, at the maturity of said note.
9. *Same; same.*—In such a case the testimony of a witness that the defendants had stated to him that they had promised the

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- plaintiff to pay said note, is admissible in evidence.
10. *Same; same.*—In such a case, a letter written by one of the defendants to the brother of the plaintiff, which shows an individual promise by said defendant to pay said note, is admissible in evidence.
11. *Evidence; when motion to exclude properly overruled.*—A motion to exclude the entire evidence of a witness, some of which is admissible and unobjectionable, is properly overruled.

APPEAL from the Circuit Court of Etowah.

Tried before the Hon. J. A. BILBRO.

This was an action brought by the appellee, W. H. Fowler, against the appellants, J. R. and W. T. Brown. The complaint, as amended, was as follows: "The plaintiff claims of the defendants the sum of two thousand four hundred and twenty-one and 56-100 dollars, with interest thereon from the 13th day of April, 1897, due upon the following state of facts: Plaintiff avers that on the 2d day of December, 1893, the defendants endorsed a written obligation executed by the Ragland Coal & Coke Company, a corporation, in words and figures as follows: [Here follows the note which was endorsed by the defendants and was dated December 2, 1893, and made payable to the plaintiff December 25, 1894, and was signed "Ragland Coal & Coke Company, by J. R. Brown, G. M."] The complaint then averred the payment of a certain amount on said note. It then averred the institution of a suit on March 18, 1896, against the Ragland Coal & Coke Company, on said note, the recovery of judgment in said suit, the issuance of execution upon said judgment and the return thereof "no property found." It was then averred in said complaint as follows: "Plaintiff avers that between the 25th day of December, 1894, and the 18th day of March, 1895, defendants each requested plaintiff not to bring suit against said Ragland Coal & Coke Company, and expressly promised to pay the debt evidenced by said note, thereby inducing plaintiff to delay bringing suit against the said Ragland Coal & Coke Company. Wherefore plaintiff now sues to recover of defendants the said sum of two thousand four hundred and twenty-one and 56-100 dollars, and also the said

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sum of eight and 5-100, the costs of suit, together with interest on said sum of two thousand four hundred and twenty-one and 56-100 dollars."

To this complaint the defendants demurred upon several grounds, which may be summarized as follows: 1. The complaint shows that the plaintiff's only cause of action or demand is against the Ragland Coal & Coke Company, and not against these defendants. 2. The complaint fails to show any cause of action or any state of facts against these defendants whereby they are legally bound for the payment of the debt or demand described in the complaint. 3. The complaint fails to show how or in what way the defendants endorsed said note so as to bind them. 4. The complaint shows that the plaintiff failed to bring suit against the maker of the note at the first term of the court to which suit could have been brought, and the complaint fails to show that defendants in writing, signed, waived or agreed that the time of bringing suit against the maker may be extended, as is required by law, in order to bind them as endorsers of said note. 5. It is shown in the complaint that the alleged promises of the defendants to pay said demand rests solely in parol, while the law requires that the consent, waiving or extending the time within which suit should be brought, in order to bind the endorser, should be in writing, signed by the endorser. 6. Because the complaint fails to show any excuse for the plaintiff not bringing suit and obtaining judgment against the maker of said note at the first term of the court to which suit could have properly been brought. 7. The complaint shows that the alleged promises of the defendants to pay said notes was wholly without consideration. 8. Because the complaint shows that the alleged promise to pay was a mere parol promise to pay the debt of another, and such promise is void under the statute of frauds. 9. Because it is not shown by the complaint that the plaintiff was, in any way, induced by the defendants to delay the bringing of suit against the makers of said note at the first term of the court to which said suit could properly have been brought, and it shows that suit was not brought for more than a year after

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it could have properly been brought. 10. It is shown in the complaint that the plaintiff waived and abandoned the alleged promises of these defendants to pay the note mentioned and described in the complaint, by bringing suit against the maker of the note, Ragland Coal & Coke Co., and prosecuted the same to judgment. These demurrers were overruled. The defendants also moved the court to strike from the complaint that portion wherein the plaintiff averred the bringing of suit and the recovery of judgment against the Ragland Coal & Coke Co., and the issuance of execution thereon and the return of said execution, upon the ground that such averments were immaterial and impertinent to any issue in the cause. This motion was overruled, the ruling upon said motion being shown only in the minute entry.

The defendants pleaded the general issue and by special plea denied that they, or either of them, requested the plaintiff not to bring suit at any time prior to the April term, 1895, of the circuit court of St. Clair, which was the first term of the court after the maturity of the note, or that prior to the April term, 1895, of the circuit court of St. Clair county that they or either of them expressly promised to pay the debt evidenced by said note or in any other way induced the plaintiff to delay the bringing of suit thereon against the maker of said note. They also pleaded the following special pleas: "4. That the alleged promise of defendants upon which plaintiff relies for recovery as against these defendants was wholly without consideration." "6. That plaintiff failed to bring suit to the first term of the court to which suit could be brought after the maturity of the note mentioned in plaintiff's complaint against the maker thereof, whereby these defendants were exonerated as endorsers thereon." "7. That the plaintiff failed to bring suit against the maker to the second term of the court to which suit could have been brought after the maturity of the note mentioned in plaintiff's complaint; that if suit had been so brought against the maker and diligently prosecuted to judgment the money could have been made, the maker being solvent."

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To the fourth plea the plaintiff demurred upon the grounds that no consideration was necessary to uphold the alleged promise, and that said plea was a mere conclusion of the pleader and states no fact on which issue could be taken.

To the sixth plea the plaintiff demurred upon the ground that under the facts set out in the complaint, the failure to sue at the first term of the court to which suit could have properly been brought, does not relieve the defendants from liability, and it was shown by the complaint and plea taken together, that plaintiff was induced to delay bringing suit by the acts and promises of the defendants.

To the seventh plea the plaintiff demurred upon the following grounds: 1. It does not deny the fact that plaintiff was induced to delay suit by the acts and promises of the defendants. 2. Under the facts shown by the plea and complaint, taken together, no duty rested on plaintiff to bring suit to the second term of the court. 3. The complaint and plea taken together show that the liability of the defendants had been fixed by suit in due time against the maker. The demurrers to these pleas were sustained.

On the trial of the cause, the plaintiffs introduced in evidence the note sued on, which was described in the complaint, and which showed that it was endorsed in blank by the defendants, J. R. and W. T. Brown. The defendants objected to the introduction of this note in evidence, on the ground that it was illegal, immaterial and irrelevant. The court overruled the objection, and the defendants duly excepted. The plaintiff then offered in evidence the transcript of the record, proceedings and judgment in the cause of the plaintiff, W. H. Fowler against the Ragland Coal & Coke Company, instituted in the circuit court of St. Clair county on March 18, 1897, the issuance of execution upon said judgment, and the return of the sheriff on said execution "no property found." Each of the defendants objected to the introduction of said transcript in evidence, on the ground that it was illegal, immaterial and irrelevant. The court overruled the objection, and the defendants duly excepted.

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John G. Fowler, a brother of the plaintiff, as a witness, testified that while his brother was absent from home, he authorized the witness to collect the note sued on; that on December 25, 1894, the date of the maturity of said note, he asked J. B. Brown, the general manager of the Ragland Coal & Coke Company, for its payment, stating that the plaintiff, his brother, wanted his money; that in this conversation said Brown stated that he would protect the plaintiff, and offered to give him a mortgage on the company's property to secure said debt; and he stated further in said conversation that neither he nor his brother wanted suit brought on the note; that there was no use in suing, inasmuch as he and his brother were worth the money, and he would protect the debt. This witness testified to having had a conversation with W. T. Brown, in which practically the same statements were made. He also testified that he did not know at that time that the defendant, W. T. Brown, was the treasurer of the Ragland Coal & Coke Company. There was no objection interposed to the testimony of J. G. Fowler during the time he was being examined as a witness, but after his examination was completed, the bill of exceptions recites that "the defendants and each of them severally and separately moved to exclude the evidence of the said John G. Fowler from the jury upon the ground that it contained no express promise to pay the debt mentioned in plaintiff's complaint by the defendants, or either of them as endorsers of the written obligation mentioned in the complaint of plaintiff in this cause; because said evidence did not show or tend to show that the plaintiff was induced by said statements or conversation of the defendants individually or either of them to delay bringing suit on the said obligation; and because said evidence was immaterial, irrelevant and illegal; and because the evidence of the said John G. Fowler showed that the statement of James R. Brown and W. T. Brown were made as officers of the Ragland Coal & Coke Company and not as individuals." The court overruled each of said motions to exclude the testimony of the witness J. G. Fowler, and to this ruling each of the defendants separately excepted.

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The plaintiff W. H. Fowler, as a witness, testified to substantially the same facts as were testified to by J. G. Fowler. There was no objection to the testimony of the plaintiff at the time it was being given, but after his examination was finished each of the defendants moved the court to exclude all the testimony of the witness W. H. Fowler, upon the same grounds as were made the basis of the motion to exclude the testimony of the witness John G. Fowler. The court overruled the motion, and the defendants duly excepted.

It was shown by the testimony of the defendants that on December 25, and some time before and after, the defendant J. R. Brown was the general manager of the Ragland Coal & Coke Company, and the defendant, W. H. Brown was the treasurer. Each of the defendants denied having by word or act induced the plaintiff to delay bringing suit against said company on the note here sued on, and denied the promises individually to pay said debt or to become responsible therefor.

During the examination of J. R. Brown, as a witness, he was asked by the defendants' counsel the following questions: "If on December 25, 1894, the Ragland Coal & Coke Company was solvent?" "What property, if any, the Ragland Coal & Coke Company owned on December 25, 1894, and what was the market value thereof?" "What property, if any, the Ragland Coal & Coke Company owned between December 25, 1894, and March 18, 1895, and what was the value of such property?" The plaintiff separately objected to each of these questions, the court sustained each of such objections, and to each of these rulings the defendants separately and severally excepted.

On the cross examination of said J. R. Brown, the plaintiff's counsel asked him the following question: "If on the 25th of December, 1894, he, witness and defendant W. T. Brown did not own a majority of the capital stock in the Ragland Coal & Coke Co?" Each of the defendants objected to this question, upon the ground that it called for illegal, irrelevant, incompetent and immaterial evidence. The court overruled the objection, and to this ruling each of the defendants separately and severally excepted. The witness answered that he and the

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defendant W. T. Brown did, at said time, own a majority of the capital stock in said company.

There was further evidence introduced by the defendants tending to show that the plaintiff and his brother did not know until after the commencement of the suit against the Ragland Coal & Coke Company that the law required suit to be brought against the maker of said note to the first term of the court to which it could properly be brought in order to bind the endorssers.

In rebuttal the plaintiff introduced one N. O. Hamilton as a witness, who testified that he had a conversation with both of the defendants in 1896 or 1897, and that in such conversation they stated to the witness that they had told plaintiff that they were responsible for the note of the Ragland Coal & Coke Company, and were worth the debt. The defendants separately and severally moved the court to exclude the testimony of this witness on the ground that it was illegal, irrelevant, incompetent and immaterial. The court overruled the objection and the defendant duly excepted.

The plaintiff then introduced in evidence a letter from the defendant John R. Brown, addressed to John G. Fowler, in which letter the defendant, John R. Brown, practically admitted his personal obligation upon said note, by reason of his promise to pay the plaintiff. This letter was written on the letter head of the Ragland Coal & Coke Company, but was signed by J. R. Brown, as an individual and not in an official capacity. The defendants each objected to the introduction of said letter in evidence, upon the ground that it shows on its face that it was written at the instance of the Ragland Coal & Coke Company, and that the promise to pay said debt was the promise of the Ragland Coal & Coke Company and not the promise of the defendants as individuals. The court overruled this objection, allowed the letter to be introduced in evidence, and to this ruling the defendants severally and separately excepted.

The court, at the request of the plaintiff, gave to the jury the following written charges: (1.) "The court charges the jury that if after the 25th day of Decem-

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ber, 1894, and before the 18th day of March, 1895, defendants requested plaintiff not to sue the Ragland Coal & Coke Company, and expressly promised to pay the debt evidenced by the note, and thereby induced plaintiff not to sue at the first term of the court after the note fell due, then defendants were not discharged from liability as endorsers by plaintiff's failure to sue the Ragland Coal & Coke Company at the first term of court." (2.) "The court charges the jury that they may look to the letter written by J. R. Brown to John Fowler in connection with all the other evidence in the case in ascertaining whether defendants between the dates named in the complaint expressly promised to pay the debt, and induced plaintiff to delay bringing his suit." (3.) "The court charges the jury that even if John G. Fowler did not know that it was necessary to sue the maker to the first term of the court after maturity of note, yet if defendants after the maturity of the note and before the 18th day of March, 1895, defendants requested plaintiff not to sue the Ragland Coal & Coke Company and expressly promised to pay the debt and thereby induce plaintiff not to sue the Ragland Coal & Coke Company to the next term of the circuit court of St. Clair county, then the jury should find a verdict for the plaintiff."

The defendants each severally and separately excepted to the giving of each of said written charges, and also severally and separately excepted to the court's refusal to give each of the following charges requested by them: (1.) "The court charges the jury that if they believe all the evidence in this case, they must find the issues in favor of the defendants." (2.) "The court charges the jury that if they find from the evidence that the alleged promises of the defendants to prevent the plaintiff in the payment of the note in controversy, was made by defendants in their capacity as general manager and treasurer of the company, the maker of the note, and not in their personal capacity, or intending to by such promises personally bind themselves, then under all the evidence in the case the verdict of the jury must be for the defendants."

There were verdict and judgment for the plaintiff.

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The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

M. M. SMITH and INZER & GREENE, for appellants. The complaint contains a sufficient cause of action, and the demurrers thereto were properly overruled.—*Davis v. Campbell*, 3 Stew. 319; *Phass v. Bachelor*, 3 Ala. 237; *Campbell v. Finnegan*, 114 Ala. 37; *Cook v. Mut. Ins. Co.*, 53 Ala. 37; *Hooks v. Anderson*, 58 Ala. 238; *Mobile S. Bank v. McDonnell*, 83 Ala. 595.

Since at the time of the alleged promise of appellants to pay said debt, they were not bound for the payment thereof, their promises as alleged in the complaint were not only without consideration, but were mere verbal promises to pay the debt of another, and, therefore, void under the statute of frauds.—*Hooks v. Anderson*, 58 Ala. 238; *Mobile S. Bank v. McDonnell*, 83 Ala. 595.

Written charges 1 and 3, given by the court at the instance of the plaintiff, should not have been given. The action is jointly against appellants and seeks a joint judgment. There is no evidence that appellants were partners, or that they were in any way jointly liable for the payment of said debt. The request not to sue and promises to pay the debt by appellants was made separately, and at different times and places. There being no joint liability the plaintiff was not entitled to recover under any phase of the evidence. *Walker v. Ins. Co.*, 31 Ala. 529; *Jones v. Engleheart*, 78 Ala. 550; *Jackson v. Bush*, 82 Ala. 396.

AMOS E. GOODHUE, *contra*.—It is well settled law that an endorser of non-negotiable paper may by a act or promise of his induce a plaintiff to delay the bringing of suit and thereby render himself liable under subdivision seven of section 894 of the Code; and that a written consent is not necessary in such a case as a written consent is necessary under section 893. The court will have no difficulty in disposing of the remaining questions presented by the appellants' a

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signments of error. It will be observed that in the case at bar there is shown the express promise to pay made before the period of suit had expired and also a representation of the solvency of the maker.—*Caulfield v. Finnigan*, 114 Ala. 39.

HARALSON, J.—1. The Code prescribes a form for a suit by an assignee against the assignor or indorser of a note, upon which suit has been brought to charge the maker, judgment obtained and execution issued according to law and returned “no property found,” as required in such cases, before proceeding against the assignor or indorser to make him liable, as by section 892 of the Code. There is no form prescribed for suits to charge the indorser, when he has in writing waived suit to charge himself (Code, § 893), or when the holder of the indorsed or assigned paper is excused from bringing suit for one of the several causes excusing him from so doing, as prescribed by section 894 of the Code. That section provides, “That the holder is excused from bringing the suit, obtaining the judgment and issuing execution thereon,” when one of the prescribed conditions, as therein laid down, exists. The 7th and last of these excuses is: “When, by any act or promise of the indorser, the plaintiff is induced to delay bringing such suit.” The statute, itself, seems plainly to excuse the bringing of the suit at any time against the maker after default to sue to the first term after the note is due, to hold the indorser liable, when one of the excuses for not doing so exists, and that under this section, with one of the excuses for not so suing the maker existing, the holder of the indorsed paper, without afterwards suing the maker at all, may proceed against the indorser, as against the maker in the first instance, to enforce his, the indorser’s, liability on the same. In *Lindsay v. Williams*, 17 Ala. 229, it was said by DARGAN, C. J.: “We should hold, if an indorser [holder] did not know in what county the maker resided, and could not by diligent inquiry ascertain the county of his residence in time to sue to the first court, that this would be a sufficient excuse for failing to sue

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at the first term, and I think it may be questioned whether it would not dispense with the necessity of a suit altogether, even if the holder by inquiry should afterwards ascertain the residence of the maker."

The complaint in this case, appears to be apt, in declaring the liability of the defendants as indorsers of the note. It is a mistaken view, that the suit is upon the judgment which the plaintiff obtained in the circuit court against the maker of the note, or a special action on the case against defendants,—one or the other of which, the defendants, on appeal, suggest the action to be. It is a clear case of a suit by the payee of a non-negotiable note against the indorsers thereof to charge them with its payment. The complaint alleges that the defendants indorsed the note, which is set out *in haec verba*, and avers that in the interim between the maturity of the note—the 25th December 1894—and the first term of the court to which suit might have been brought,—the 18th day of May, 1895,—“defendants, each, requested plaintiff not to bring suit against said Ragland Coal & Coke Company, (the maker of the note) and expressly promised to pay the debt evidenced by said note, thereby inducing plaintiff to delay bringing suit against the said Ragland Coal & Coke Company, wherefore plaintiff now sues to recover of defendants, (the indorsers of said note), the sum of \$2,421.56, and also the said sum of \$8.05, the costs of suit against the makers, with interest,” etc. While the statute, under the allegations of the complaint, did not require this suit to be instituted against the maker before suing the indorsers to charge them, it was clearly not against their interest for it to have been done. It was a step in their interest, to enforce payment, if it could be done, out of the maker of the note, without resort to the defendants as indorsers. It was an act of good faith, without the effect, as contended by the defendants, of a waiver of the promise of defendants to pay, as an inducement to delay suit, and one at which they cannot be heard to complain. The refusal of the court to grant the motion of defendants to strike the part of the complaint setting up the institution of the suit, the rendition of judgment therein, issuance of ex-

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cution thereon and its return of "no property found," was not reversible error. Furthermore, the ruling on the motion appears alone in the minute entry and is not here reviewable. Nor was there reversible error in overruling the demurrers to the complaint on the same ground, or for allowing in evidence the certified transcript of the judgment, the execution and the return of the sheriff thereon.

2. The legislative history of sections 892, 893 and 894 of the Code was reviewed, and construction carefully given to them by BRICKELL, C. J., in the late case of *Caulfield v. Finnegan*, 114 Ala. 39. Of section 894, and its subdivision 7, it was said: "Without now assuming to decide what acts, promises, inducing the delay of suit, the subdivision may comprehend, it is enough to say, that an express promise to pay the debt with or without writing, or representation of the solvency of the maker, inducing the delay of suit, made before the period of suit had expired, we incline to the opinion, would constitute a promise, or an act, within its meaning. The promise to pay, must, however, be express; it must not be a mere implied promise deduced from a verbal waiver of suit, for that would render nugatory the mandate of the statute that the waiver to be availing must be in writing (section 893), and if it was in writing, there would be no occasion for resorting to the subdivision." A clear distinction is drawn in the decision between a *waiver* of time for bringing suit under section 893, and an express *promise* to pay the debt, as an excuse for not suing, under section 894. In the one case, the waiver must be in writing, and in the other the promise need not be.

3. The complaint alleges,—as to the endorsement of the note,—its date having been given as the 2d December, 1893: "Plaintiff avers that on the 2d day of December, 1893, the defendants indorsed a written obligation executed by the Ragland Coal & Coke Company, a corporation, in words and figures following" (setting out the note). The act of endorsement, either in blank or in full, without qualification, says Mr. Parsons, "forms a new contract with the indorsee, that the maker will pay the same at maturity, when duly called

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upon and notified, and that the indorser will pay the same if he does not. It is an original undertaking, and not a promise to pay the debt of another under the statute of frauds."—2 Parsons on Notes and Bills, pp. 23, 25; Story on Notes, § 135. The indorsement is *prima facie* evidence, between the immediate parties, of a full and valuable consideration, but as a matter of defense, it may be inquired into, the burden being on him who disputes the consideration.—2 Parsons on Notes & Bills, 23; Story on Prom. Notes, § 7; 181, 196; *Gee v. Nicholson*, 2 Stew. 512; *Parkham v. Stringfellow*, 5 Ala. 346; Code, § 1800.

The demurrer to the complaint was properly overruled.

4. The demurrer to defendant's pleas was properly sustained. The 4th is not a denial of the consideration of the note, but of the promise to pay, to induce defendant not to sue the maker. What consideration there was for the promise is set out in the complaint, which the plea of the general issue put in issue. Furthermore, there was no valuable consideration needed for the alleged promise. The vices of the 6th and 7th pleas fully appear from what has already been said.

5. The presumption from the allegations of the complaint is, that defendants separately indorsed said note. Any evidence on the part of either of them that he made a special, individual promise to pay was good as against him; and the evidence tends to show that each defendant recognized the debt as his individual obligation, and made such promise.

6. Evidence of the solvency of the Ragland Coal & Coke Company at the time the note fell due, and the property then owned by it and its value, as proposed to be proved by defendants, were facts entirely irrelevant to the issue in the case, and were properly disallowed by the court. On the cross-examination of the defendant, J. R. Brown, examined in chief by defendants, he was asked by plaintiff's counsel: "If on the 25th of December, 1894, [which was the date of the maturity of the note], he, witness and W. T. Brown did not own a majority of the capital stock in the Ragland Coal &

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Coke Company?" There was no error in allowing him to answer, against the objection that the evidence sought was illegal and immaterial, that they did own a majority of the stock. The vital issue in the case was, whether or not the defendants requested plaintiff not to sue the Coal & Coke Company, and promised to be personally responsible for the debt. If they had no interest in the company, it might appear unreasonable, that they had made such a request and promise; but, if they owned a majority of the stock in the company, and practically controlled it, they had motive and interest in such request and promise, and it was competent to go to the jury in determining on all the evidence, whether they made such request and promise or not.

7. Evidence of N. O. Hamilton was offered by plaintiff, that in the year 1896 or 1897, he had a conversation with the defendants in Asheville, in which they said that they had told the plaintiff that either of them was worth the debt; that W. T. Brown said that he went to Fowler and told him that he and his brother were worth the debt, and both of them said that they had offered to give plaintiff a mortgage on the company's property and pay \$300 per month until the debt was settled. Motion was made by defendants to exclude this evidence, on the ground that it was illegal, irrelevant and immaterial. There was no error in overruling the motion. The evidence tended to show an admission by defendants of the request and promise alleged to have been made to induce plaintiff not to sue the maker of the note, and was competent in connection with the other evidence tending to establish the promise.

8. The letter of J. R. Brown to J. G. Fowler in 1896 was properly admitted, against the objection of illegality and irrelevancy, and because it appeared to have been written for, and at the instance of the Coal & Coke Company. It contains an individual promise to pay at that time, and also an expression of what he and the other endorser had desired in the past, viz., "we wanted you to still hold the same paper." When taken with all the evidence, it tends to support the main issue in the cause.

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9. The motion to exclude the evidence of John G. Fowler was properly overruled. The motion went to the entire evidence, portions of which were unobjectionable. No objections appear to the evidence as the witness gave it. Furthermore, the evidence tends to establish the promise as alleged. The same is true of the evidence of W. H. Fowler.

10. There was no error in the charges given at the request of plaintiff. The suit is not on a joint contract, or cause of action, as contradistinguished from a several undertaking by defendants. The parties, as the evidence tends to show, each made the promise counted on. Under the allegations of the complaint, the plaintiff might have sued either of defendants without the other and maintained the suit on his individual promise. It is only when the complaint avers a joint contract or cause of action, that the evidence must show, for a recovery, a joint and not a several promise. *Jackson v. Bush*, 82 Ala. 396; *Jones v. Englehardt*, 78 Ala. 505. Charge two may have been subject to an objection of being argumentative, or laying stress on a particular phase of the evidence, but this is not reversible error.

It needs no discussion to show that the charges requested by defendants were properly refused.

Let the judgment be affirmed.

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Application for Mandamus.

1. *Mandamus*; there must be averred a demand for the performance of the act and the refusal thereof as a condition to the filing of the application.—To entitle a petitioner to the extraordinary writ of *mandamus*, he must show that he has a clear right to the performance of the act or the duty demanded, and he must aver in his petition that he had made a demand upon the respondent, and that the respondent had neglected or refused to comply therewith; and in the absence

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of such an averment, a petition for *mandamus* is defective and should be dismissed.

APPEAL from the Order of the Judge of the Circuit Court of Madison County.

Heard before the Hon. O. KYLE.

This is a petition addressed to the judge of the circuit court of Madison county, and filed by the appellee, Anthony W. Moseley, seeking, by *mandamus*, to have the petitioner restored to his rights and franchises as a member of the "Christian Church of Huntsville, Alabama," a corporation created and organized under the general laws of this State.

Under the opinion on the present appeal it is unnecessary to set out the facts of the case in detail.

On the hearing of the cause the court rendered judgment denying the writ of *mandamus*, and ordered the petition dismissed. From this judgment the petitioner appeals, and assigns the rendition thereof as error.

ROBERT C. BRICKELL and OSCAR R. HUNDLEY, for appellants.

COOPER & FOSTER, *contra*.

TYSON, J.—The petition for *mandamus* in this case proceeds upon the theory that no corporate action had ever been taken by the corporation in excluding the petitioner from the exercise of his rights as a member and as an officer. Indeed, it averred that no vote of the members comprising the corporation was had directing the striking of his name from the roll of membership, but that it was the unauthorized act of the respondents Collins and McBride assuming to act in their official capacity as elders. The prayer of the petition is for a writ of *mandamus* directed to the corporation, to Ira F. Collins, Jesse B. Boyd and S. E. Collins, commanding that a certain paper writing purporting to have been adopted by the members of the corporation directing the church registrar to cancel the name of petitioner on the roll of membership, be stricken from the file of the record of memorials of said church, and that any minute entry or record of the proceedings

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on said paper writing may be expunged. And further commanding that his name be restored to the roll of membership of said church. On the hearing, the petition was dismissed and this appeal is prosecuted from that judgment.

Premitting a discussion or decision on the question as to whether the wrongs complained of are not solely for the cognizance of an ecclesiastical tribunal, purely ecclesiastical or spiritual, involving the right of the church to exclusively determine, we think it clear, treating the case as made by the petition as one involving property rights, that its dismissal was proper.

To entitle the petitioner to this extraordinary writ he must show that he has a clear right to the performance of the act or duty demanded and that on demand the respondents have neglected or refused performance. "The invariable test by which the right of a party applying for a *mandamus* is determined, is to inquire, *first*, whether he has a clear legal right; and if he has, then *secondly*, whether there is any other adequate remedy to which he can resort to enforce his right."—*Spee v. Cocke*, 57 Ala. 215; *Ex parte Edwards*, 123 Ala. 102; *Hill v. Tarrer*, 130 Ala. 592.

In *Merrill on Mandamus* the rule is stated to be: "When the duty sought to be enforced is of a private nature, affecting only the right of the relator, a personal demand is necessary; and it is also necessary, if the duty sought to be enforced is of such a character that it could not be expected to be performed till demanded. Decisions, that there must be an express and distinct demand or request to perform, must be confined to such cases. Where, however, the duty is of purely public nature, wherein no individual right or duty is concerned, and where there is no one person upon whom a right or duty devolves to make a demand of performance, an express demand or refusal is not necessary."—§ 224. The same author says: "Since this writ never issues against a party unless he is in default, it must clearly appear by the allegations in the petition that a demand has been made on him to fulfill his duty and perform the act desired. * *

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When an averment of a demand is necessary, that lack of such averment is fatal, even though the trial court may find such a request and refusal. * * * When a demand is necessary, the fact that it was made must be alleged with precision."—§ 257. Again he says: "It must appear by the allegations of the petition that the party complained of refused or failed to comply with the demand to fulfill his duty."

Moses on *Mandamus*, on page 18, states the rule to be: "In order to lay the foundation for issuing a writ of *mandamus*, there must have been a refusal to do that which it is the object of the *mandamus* to enforce, either in direct terms, or by circumstances distinctly showing an intention in the party not to do the act required."

In Tapping's *Mandamus*, p. 282, it is said: "It is an imperative rule of the law of *mandamus*, that, previously to the making of the application to the court for a writ to command the performance of any particular act, an express and distinct demand or request to perform it, must have been made by the prosecutor of the defendant, who must have refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively implied; it being due to the defendant to have the option of either doing or refusing to do, that which is required of him, before an application shall be made to the court for the purpose of compelling him."

This latter quotation was adopted and enforced by the Supreme Court of the United States, as announcing the correct rule, in *United States v. Boutwell*, 17 Wall. 604. See also *Heard's Shortt Ex. Rem.*, pp. 247-8; *High's Ex. Legal Rem.*, §§ 12, 13; *State v. Lehre*, 7 Rich. Law (S. Car.), 250; *O. & V. R. R. Co. v. Plumas Co.*, 37 Cal. 362; *The People v. Mount Morris*, 137 Ill. 579; *The State v. Schaack*, 28 Minn. 359; *The State v. Davis*, *Ib.* 431; *The State v. Smith*, 31 Neb. 590; *Douglas v. Town of Chatham*, 41 Conn. 211; *Lee Co. v. The State*, 36 Ark. 276; *Grand Co. v. Savings Bank*, 8 Colo. App. 43; *State v. Mayor & Aldermen*, 22 Fla. 25, 26; *Leonard v. House*, 15 Ga. 473; *L. E. & W. R'y Co. v. The State*, 139 Ind. 158; *Compton v. Airial*, 9 La. Ann. 496; *Cheseboro v. Montgomery*, 70 Mich. 650.

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An analogous principle has often been recognized by this court in suits brought by stockholders against corporations of which they are members to correct alleged corporate wrongs. In those cases, it has been uniformly held that generally before the stockholder can maintain an action against the corporation, he must first make demand upon the managing board of officers, to correct the wrongs complained of and meeting with failure or refusal, he must next seek redress through the stockholders, as a body.—*Decatur Co. v. Palm*, 113 Ala. 531; *Bridgeport Co. v. Tritsch*, 98 Ala. 274; *Steiner v. Parsons*, 103 Ala. 215; *Roman v. Woolfolk*, 98 Ala. 219.

We have but to apply these principles to the petition in this case. No demand and refusal upon the church is averred. *Non constat*, the wrongs complained of would have been righted by that corporation had it been requested to do so.—*Parker v. Hubbard*, 64 Ala. 203. While it is doubtless immaterial, we call attention to the fact that the evidence shows that no request or demand was ever made upon the corporation to right the wrongs alleged.

It is hardly necessary to add that the acts of the respondents, Collins, Boyd and Collins, if unauthorized and void as averred in the petition, did not and could not operate to deprive the petitioner of any of his rights as a member or officer in the corporation.

It is unnecessary to notice any of the exceptions reserved upon the trial, since they cannot change the result.

The judgment refusing the writ and dismissing the petition must be affirmed.

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Action of Detinue.

1. *Detinue; sufficiency of plea.*—In an action of detinue, a plea that "defendant further suggests that the title to suit is partly based upon a mortgage," presents no material issue, and should, upon motion, be stricken from the file.
2. *Same; same.*—In such action, a plea which attempts only to set up fraud in the execution of the mortgage covering the property sued for by the defendants to the plaintiffs, without showing that plaintiff's title to or right to recover the property depended upon or was affected by the alleged fraud, presents no defense to the action and is subject to demurrer and motion to strike.
3. *Execution of written instrument; attestation by one who did not see party sign.*—A writing may be validly attested by one who did not see the parties executing it sign such writing, if such parties appear before him and acknowledge that the signatures to the writing are their own, and requested him to sign in attestation of that fact; and this is true although the signatures of one of the parties to the instrument was made by his name being written for him and he affixing his mark thereto.
4. *Mortgage of personal property; when conveys title to agent and gives him right to maintain detinue.*—Where a mortgage of personal property is given to certain named persons described therein as agents of a third party, the certain named parties as mortgagees acquired title to said property and can maintain an action of detinue against the mortgagors upon default being made by them.
5. *Mortgage of personal property; right of possession thereunder; detinue; admissibility in evidence.*—A mortgage of personal property, in the absence of a stipulation to the contrary, vests in the mortgagee a right to immediate possession; and when such mortgage is given to secure the performance of a contract, if the mortgagor fails to perform the contract, the mortgagee can maintain an action of detinue for the mortgaged property, and said mortgage is not rendered inadmissible in evidence by the non-production of the contract, the performance of which was intended to be secured by the execution of the mortgage.

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6. *Detinue; mortgage of personal property; sufficiency of judgment.*

Where in an action of detinue, the plaintiff's right to possession is claimed under a mortgage which was given to secure the performance of a contract, which the mortgagor defendant had failed to perform, if there is a suggestion made upon the record that the suit was by a mortgagee against a mortgagor, as provided by statute, (Code, § 1477), and the cause is tried by the court without the intervention of a jury, it is proper for the court in rendering judgment to ascertain the amount of the mortgage debt to the amount expressly stipulated for in the mortgage, as liquidated damages which were to accrue upon the failure of the defendant to perform said contract.

APPEAL from the City Court of Anniston.

Tried before the Hon. JAMES W. LAPSLEY.

This was an action of detinue brought by the appellees, Roop & Sewell, a partnership, against the appellants, Jarrett Elston and W. F. Elston, to recover the possession of a horse, a mule, a buggy and wagon, and the value of the hire, or use, of such property during the detention thereof. The case was instituted in a justice of the peace court and was carried to the city court of Anniston by appeal. In the city court the defendants filed the following pleas: "1. And now come the defendants and say they are not guilty, and do not detain the property sued for and described in the complaint. 2. Defendants further suggests that the title to suit is partly based upon a mortgage. 3. Defendants say that they undertook to make a joint contract with F. L. Gardner to carry the mail on route 24,316 from Zula to Anniston for a term of one year, and that the defendants were told by one Sewell, one of the plaintiffs in this case, that the contract referred to the mortgage contained in the agreement, and that relying on the representations of Sewell, they undertook to execute said contract and the mortgage sued on, and that said Sewell misled them as to the time, and that immediately upon the discovery of the fraud practiced in the procuring of the signature of defendants they at once notified F. L. Gardner that they would not undertake to carry said mail for four years as named in

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the contract." The plaintiff demurred to the third plea upon the following grounds: "1. Said plea fails to show what connection the contract and mortgage therein referred to have with the plaintiffs' suit. 2. For that no sufficient facts are alleged to show that said contract and mortgage, if they are the basis of the suit, are not valid and binding. 3. For that said plea does not show any such false and fraudulent representations by plaintiffs, or any one for plaintiffs, as would avoid either the contract or mortgage referred to in the plea." The plaintiffs also moved to strike the third plea upon the ground that said plea is frivolous and fails to show wherein it would afford a defense and states no issue involved in the cause.

The plaintiffs moved to strike the defendants' suggestion numbered 2 from the file upon the following grounds: 1. No facts are stated in said plea to show that plaintiffs claimed title to the property sued for by the terms of the mortgage. 2. That the fact that plaintiffs base their right to recover partly on a mortgage is no defense to the suit. 3. That said suggestion fails to state sufficient facts to authorize the court to ascertain any fact or issue in the case. The court sustained the plaintiffs' demurrers to the defendants' third plea and also the motions to strike the second and third pleas.

On the trial of the cause the plaintiffs introduced one George J. Stone, who testified, against the defendants' objection, that the defendants came before him and admitted that they signed a certain mortgage which was given to Roop & Sewell; that he did not see the defendants sign the mortgage, but that the defendants swore before him that they had signed the same, and that Jarrett Elston said to him that he made his mark opposite his name to said mortgage; that thereupon the witness signed his name as a witness to the signature of the defendants to said instrument and attached his notary public seal thereto. The paper referred to in the testimony of the witness Stone, which was purported to have been signed by the defendants in the presence of the witness Stone was as follows: "State of Alabama, Calhoun County. Five days after failure

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to transport the U. S. Mail on Route No. 24316 from Anniston to Zula from Aug. 13, 1900, to June 30, 1904, I agree to pay Roop & Sewell, Agents for F. L. Gardner, contractor with United States for above named route, three hundred dollars liquidated damages, for value received, with interest from the fifth day after failure until paid, at seven per cent per annum, with all costs of collection, including ten per cent attorney's fees. And to secure the payment of this note I hereby mortgage and convey unto said payees, their heirs and assigns, the following property, to-wit:” There then follows a description of the property sued for in the present action, and also a waiver of the right of exemption. Upon the plaintiffs offering this instrument in evidence the defendants objected upon the grounds: 1. That the execution of said instrument had not been proved. 2. Said mortgage does not show any title in the plaintiffs. 3. That the mortgage was irrelevant and immaterial. The court overruled the objections and the defendants duly excepted. The defendants then made a suggestion as provided under the statutes that the mortgage be ascertained. Sewell, one of the plaintiffs, testified as a witness, that the defendants had never carried the mail under the written contract which they signed with F. L. Gardner. It was further shown that the defendants were not in possession of the property at the time of the institution of the suit. Each of the defendants, as a witness, testified that they did not know at the time of executing the mortgage introduced in evidence that they were signing such paper; that they had agreed with F. L. Gardner upon representations made to them, that they would carry the mail, but that they had never agreed to execute the mortgage introduced in evidence, and that said mortgage was not read over to them before it was signed by them, nor did they know its contents. In rebuttal, Sewell, one of the plaintiffs, and George Stone, each, testified that the mortgage was read over to the defendants before they signed and executed the same.

The cause was tried by the court without the intervention of a jury. Upon the introduction of all the ev-

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idence the court rendered judgment in favor of the plaintiffs, and in accordance with the suggestions on the record that the suit was by mortgagees against mortgagors, the court ascertained the amount of the mortgage debt to be the sum of \$300. To the rendition of this judgment the defendants duly excepted. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

E. H. HANNA, for appellants.—If there was fraud in obtaining the signatures or in the execution of the contract, then plaintiffs could not recover.—*Foster v. Johnston*, 70 Ala. 249; *Davis v. Snyder*, 70 Ala. 315.

The mortgage should not have been introduced in evidence, for it was not shown to have been executed as required by law.—*Houston v. State*, 114 Ala. 15; *Stewart v. Beard*, 69 Ala. 470; *Bickley v. Keenan*, 60 Ala. 293.

COLEMAN & BLACKMON, *contra*.—The execution of the mortgage was sufficiently proved to allow the mortgage to be introduced in evidence.—9 Am. & Eng. Ency. Law (2d ed.), 149 and cases cited in note 4; *Merritt v. Phinx*, 48 Ala. 87; *Sharp v. Orme*, 61 Ala. 263; *Rogers v. Adams*, 66 Ala. 600; *Carlisle v. Carlisle*, 78 Ala. 542; *Torrey v. Forbes*, 94 Ala. 135; *Railroad Co. v. Hammond*, 104 Ala. 191.

The fact that the plaintiff in this suit was described in the mortgage as the agent of Gardner, did not prevent them from acquiring under the mortgage the title to the property conveyed therein. Under said mortgage they had the title to the property conveyed therein and a right to maintain an action of detinue.—*Chambers v. Mauldin*, 4 Ala. 447; *Barker v. Washington*, 5 S. & P. 142; 4 Am. & Eng. Ency. Pleading & Practice, note 7, page 514.

SHARPE, J.—Plea 2 to the complaint filed in the city court did not present a material issue, nor from anything appearing in the pleadings could it be seen that plea 3 presented a defense since it attempts only

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to set up fraud in the execution of a mortgage without showing that plaintiffs' title to or right to recover the property depended on or was affected by the alleged fraud. These pleas were each subject to the demurrers and to the motion to strike.

A writing may be validly attested by one who did not see the parties to it sign, where they appear before him and acknowledge the signatures are their own, and requested him to sign in attestation of the fact.—1 Devlin on Deeds, § 257; 9 Am. & Eng. Ency. Law, 149 and note 4. In this way Stone's attestation of the mortgage under which the plaintiffs' claim was procured, and thereby the mark of Jarrett Elston became a signature within the meaning of that clause of section 1 of the Code which provides that "signature" or "subscription" includes mark when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness."

The fact that plaintiffs were described in the mortgage as agents for Gardner did not prevent title to the property from vesting in plaintiffs. It may be that as between them and Gardner they were only trustees, but they were not for that reason incapacitated to maintain the action.—*Baker v. Washington*, 5 Stew. & Port. 142; *Pierce v. Jackson*, 56 Ala. 599.

The mortgage though given to secure performance of a contract with Gardner was not rendered inadmissible as by the non-production of that contract, for under the issues the performance or breach of that contract was not involved. The mortgage on its face imported a present conveyance of the property sued for to the plaintiff as security for a debt to accrue upon specified contingency, viz.: defendants' failure to carry mail on a given route for four years. It contains nothing either expressly or impliedly postponing plaintiffs' right to have possession of the property or making that right to depend on a failure to perform the contract with Gardner. It, therefore, entitled the plaintiffs to have possession immediately upon its execution.—*Ellington v. Charleston*, 51 Ala. 166; *Heflin v. Slay*, 78 Ala. 180.

The gist of the action was the alleged wrongful de-

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tention, and if the validity of the mortgage be assumed, the detention was wrongful since the plaintiffs had both the legal title and the right of possession. On the question of whether the mortgage was rendered invalid by fraudulent representations the burden of proof was on defendants and the evidence on that issue does not seem to preponderate in their favor.

Upon defendants' suggestion made under section 1477 of the Code the court sitting without a jury ascertained the amount of the mortgage debt to be \$300, which was the amount expressly stipulated for in the mortgage as liquidated damages to accrue upon the failure of defendants to carry the mail on a given route for four years. This finding was proper whether the stipulation be regarded as one for liquidated damages or for a penalty. If for the former, the mortgage was security for the whole amount, and if for the latter the mortgage was still security for the damage actually sustained by the breach of the agreement, and of this amount the agreement of parties was evidence upon which the court was authorized to predicate its finding in the absence of other evidence on the subject, of which there was none.

The amount of the debt as ascertained exceeded the value of the property and, therefore, the court was not, under the statute, required to so frame the judgment as to allow defendants to pay the debt and costs in discharge of their liability to execution on the principal judgment; but the fact that the judgment was so rendered did not injure the defendants and was, therefore, not error entitling them to a reversal.

The judgment will be affirmed

Laster v. Blackwell.

Statutory Action of Ejectment.

1. *Trial and its incidents; how judgment by court without jury re-*
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viewed on appeal.—Where a case is tried by the court without the intervention of a jury, and the evidence is in conflict, the judgment rendered by the court will not be reversed, unless it is plainly erroneous.

2. *Same; same; action of ejectment.*—In an action of ejectment the cause was tried by the court without the intervention of a jury. The only witnesses testifying in the case were introduced by the plaintiff. The material contention was as to the contents of a lost deed; the plaintiff's contention being that this deed conveyed a life estate to their mother, with remainder in fee to them, while the defendant's contention was that said deed conveyed an absolute fee simple title in the mother. The testimony of four of the witnesses introduced by the plaintiff tended to show that the life estate to the mother with remainder to her children was conveyed by said deed, but the statements of these witnesses were more of their construction of the deed than statements as to their recollection of its contents, or the contents in substance, and two of the witnesses had never read the deed, but had heard it read about forty years before the trial. The other three of the witnesses introduced by the plaintiff had each read the deed, and each stated positively that it contained no conveyances of a life estate to the mother with remainder to her children, but was an absolute warranty deed to the mother, saying nothing about a life estate. *Held:* That with such conflict in the testimony of the witnesses introduced by the plaintiff, the judgment of the court in favor of the defendant could not be said to be plainly erroneous, and, therefore, such judgment will not be reversed.
3. *Same; same.*—To reverse a judgment on appeal, there must be manifest error appearing in the record; and in an action of ejectment, where the plaintiffs claim title as remaindermen under a lost deed, but there is no evidence in the record that the life tenant was dead at the commencement of the suit, a judgment in favor of the defendant can not be said to be erroneous, and will not be reversed.

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

This was a statutory action brought by the appellants against the appellees. The plaintiffs claim to be the owners of the lands sued for, under and by virtue of a deed executed by Micajah Sanson, Lemile Sanson, his wife, to Eliza Laster, for and during her natural life

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and at her death to her children. All of the plaintiffs are the children and heirs-at-law of the said Eliza Laster.

The defendants claim through a deed alleged to have been executed by Micajah Sanson and Lemile Sanson, his wife, to Eliza Laster, but which, defendants contend, was an absolute warranty deed, and neither reserved nor limited any remainder or estate to her children. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The cause was tried by the court without the intervention of a jury, and judgment was rendered for the defendant. The plaintiffs appeal, and assign as error, among other rulings of the trial court, the rendition of judgment for the defendant.

GRIGSBY E. THOMAS, JR., and HENRY F. REESE, for appellant.

JAS. AIKEN and DORTCH & MARTIN, *contra*.

DOWDELL, J.—This is a statutory action of ejectment. The case was tried in the court below without the intervention of a jury, and a judgment was rendered by the court below in favor of the defendants. While there are several assignments of error, only one is insisted on in brief of counsel for appellants, and that is, that the trial court erred in rendering judgment in favor of the defendants on the evidence. The evidence was in conflict, and the rule in such cases is, not to disturb the judgment unless it is plainly erroneous.—*Scarborough v. Borders & Co.*, 115 Ala. 436. The burden of proof was on the plaintiffs to make out their case. The only witnesses testifying in the case were introduced by the plaintiffs. The material contention in the case was as to the contents of a lost deed, upon which plaintiffs relied for their title to the land in question. Their contention being that this deed conveyed a life estate to their mother, one Eliza Laster, with remainder in fee to them. The tendency of the evidence of four of plaintiffs' witnesses was to support the plaintiffs'

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contention, while the tendency of the evidence of three other witnesses, who were sworn on behalf of plaintiffs on their cross-examination, was to disprove plaintiffs' contention. The plaintiffs in introducing these witnesses vouched for their credibility as much so, as those witnesses whose evidence tended to support their theory of the case. Under this conflict in the testimony, we cannot say that the judgment of the court on the evidence was plainly erroneous. On the contrary, after careful review and consideration of the evidence, we are clearly of the opinion that the conclusion of the trial court was right and its judgment proper. The testimony of those witnesses that tended to show, that a life estate to the mother with a remainder to her children, was conveyed, as evidence of the contents of the lost deed, was of a character not very satisfactory, and of doubtful competency but the question of its admissibility is not before us, as it was admitted. We say not of a nature very satisfactory, because their statements were rather more of the witnesses' construction of the deed, than a statement of their recollection of its contents, or the contents in substance. Two of the witnesses had never read the deed, but had only heard it read about forty years since. The three witnesses whose testimony was in opposition to this, had read the deed, and stated positively that it contained a conveyance of a life estate to Eliza Laster with remainder to her children, but was a straight deed to Eliza with warranty and said nothing about a life estate. With this decided conflict in the evidence, and between witnesses introduced by the plaintiffs, with the burden upon them of proving their case to the reasonable satisfaction of the court, a case is not presented on appeal for the reversal of the judgment of the trial court as being plainly erroneous.

There is another question in the case, which is fatal to appellants' right of reversal of the judgment. To reverse a judgment on appeal there must be manifest error appearing in the record. The plaintiffs claim title under the lost deed as remaindermen. If it were conceded that this deed conveyed title to them as

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maindermen, there is no evidence in the record that the life tenant was dead at the commencement of the suit. It is an elementary principle in actions of ejectment, that the plaintiff in order to recover must have title at the commencement of the suit as well as at the trial. The only evidence as to the death of Eliza Laster, the supposed life tenant, is to be found in the depositions of two of plaintiffs' witnesses, one of whom says "she died last June a year ago;" the other witness says "she has been dead two years." This suit was begun on the 23d of July, 1894, and the trial was had on the 4th day of October, 1900. There is nothing in the record to inform us when the depositions of the two witnesses who testify as to the death of Eliza Laster, were taken. For aught that appears these depositions may have been taken in the year 1900, when the trial was had, and if so, she was not dead at the commencement of the suit, and then the plaintiffs as remaindermen could not maintain this action. Error on appeal will not be presumed, it must be shown.

Affirmed.

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Statutory Action of Detinue.

1. *Appeal from judgment by justice of the peace; not necessary that the paper sent up by the justice should be certified.* Where an appeal is taken from a judgment of a justice of the peace to the circuit court, it is not necessary for the justice of the peace to certify anything; but all that is required by the statute, (Code, § 484), is that he must return all the original papers in the cause, together with the statement of the case and judgment rendered, signed by him.
2. *Same; when not necessary for new complaint to be filed; sufficiency of judgment by default.*—When on an appeal taken from a judgment of the justice of the peace, there is included in the original papers returned by the justice to the clerk of the court to which the appeal is taken, a perfectly good complaint, it is proper for the court to which the appeal is

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taken to enter upon the trial on that complaint; or, the defendant not appearing, to render judgment by default on that complaint.

APPEAL from the Circuit Court of Lawrence.

Tried before the Hon. O. KYLE.

This was a statutory action of ejectment brought by the appellee, Jacob Abraham, as trustee, against the appellant, John Hardee, to recover the possession of certain personal property described in the complaint. The action was commenced in a justice of the peace court. From a judgment in favor of the plaintiff in said court, the defendant appealed to the circuit court, and executed a regular appeal bond. The justice of the peace sent to the clerk of the circuit court copies of the papers issued by him which included the summons and complaint and the replevy bond given by the defendant. The complaint was in the regular statutory form of an action of detinue. The justice of the peace also sent to the clerk of the circuit court a statement of the case and a judgment rendered by him. This statement was signed by the justice of the peace. Neither the papers, nor the statement or transcript sent up by the justice of the peace to the clerk of the circuit court were certified by the justice of the peace. There was no complaint filed in the circuit court. On the case being called in the circuit court a judgment by default was rendered against the defendant; and upon a writ of inquiry the value of the property was ascertained and judgment rendered accordingly.

The defendant appeals, and assigns as error that the transcript sent to the circuit court of the justice of the peace was not certified and that no complaint was filed in the circuit court.

W. T. LOWE and JAMES JACKSON, for appellant, cited *Simmon v. Titcher*, 102 Ala. 317; *Elmore v. Simon*, 67 Ala. 528; 1 Brick. Dig., 114, § 74; *R. & D. R. R. Co. v. James*, 102 Ala. 212.

JAMES H. BRANCH, *contra*, cited *Heyman v. McBurney*, 66 Ala. 511; *So. Ex. Co. v. B. & P.*, 100 Ala. 275;

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Larcher v. Scott, 2 Ala. 40; *Wolf v. Parham*, 18 Ala. 441; Code, § 484; *Arundale v. Moore*, 42 Ala. 482.

MCCLELLAN, C. J.—Section 484 of the Code is as follows: "When an appeal is taken, the justice must return all the original papers in the cause, together with a statement, signed by him, of the case and the judgment rendered by him, to the clerk of the court to which the appeal was taken, within ten days after the taking of the appeal." The transcript filed here in this case contains copies of the papers in the cause before the justice of the peace, a copy of the statement of the case and the judgment rendered signed by the justice of the peace and a copy of the bond given on appeal to the circuit court; and the clerk of the circuit court certifies to this court in substance and effect that all these papers, thus copied, are and were in the circuit court. This was a full compliance with the statute set out above. It was not necessary for the justice of peace to *certify* anything. The record before us shows that he returned the original papers to the court together with the statement signed by him, which the statute required, and this was quite sufficient. Indeed, the appeal bond showing the parties below and reciting the judgment there rendered was itself sufficient to give the circuit court jurisdiction and to enable it to proceed with the cause.—*Larcher v. Scott*, 2 Ala. 40; *McAlpin v. Pool*, Minor, 316; *S. & N. R. Co. v. Pilgreen*, 62 Ala. 305.

Among the original papers sent to the clerk by the justice of the peace was a perfectly good complaint, and it was entirely proper for a trial to be had in the circuit court on that complaint, or, the defendant not appearing, for a judgment by default to be rendered on that complaint.—*Littleton v. Clayton*, 77 Ala. 571.

Affirmed.

[Bostick v. Jacobs et al.]

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2141 200**Bostick v. Jacobs et al.***Bill in Equity to compel the Application of Proceeds from Mortgage Sale.*

1. *Mortgage securing several debts; application of proceeds of sale.*—Where a mortgage is given to secure several notes, upon two of which there is a surety who was not a party to the mortgage, upon the foreclosure of the mortgage, the mortgagee must see that a just proportion of the proceeds of the sale is applied to the discharge of the notes upon which the surety is bound, and the portion of the proceeds at such sale applicable to the debt on which the surety is bound will be credited as a payment *pro tanto* on such debt, and the surety to that extent discharged.

APPEAL from the Chancery Court of Jackson.

Heard before the Hon. WILLIAM H. SIMPSON.

The bill in this case was filed by the appellant, F. A. Bostick, against the appellees on August 4, 1899, and averred substantially the following facts: On July 5, 1898, J. W. Shoemaker purchased a certain tract of land from the defendants for the sum of \$4,000. This was a credit transaction and Shoemaker executed his four promissory notes to his vendors, one for \$500 due November 1, 1898, one for \$1,000 due January 1, 1899, one for \$1,000 due November 1, 1899, and one for \$1,500 due January 1, 1900. The complainant, F. A. Bostick, signed the first of these notes executed by Shoemaker by deed and Shoemaker executed a mortgage to them upon the same property to secure the payment of the four notes above mentioned. Upon default in the payment of the first two notes, the defendant brought a suit in the circuit court against the appellant as surety on the first two notes, and on March 7, 1899, recovered a judgment against the complainant in the sum of \$7,738.72. On June 12, 1899, the defendants, by virtue of the power contained in the mortgage, foreclosed said mortgage and at said foreclosure sale

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became the purchaser of the property for \$1,600. Shortly after the foreclosure of the mortgage and the purchase of the mortgaged property by the defendants they sold the property so purchased to one Smith for the sum of \$4,000. It was then averred in the bill that it was understood and agreed between the complainant and Shoemaker on the one side and the defendants on the other, that the complainant should be protected as such surety by the mortgage which was to be executed on the property so purchased by Shoemaker and the defendants; that this mortgage was to be primarily for the protection of the complainant as surety on said two notes; that the mortgage executed was not such a mortgage as was agreed to be given, and did not give to complainant the primary protection agreed upon; that said mortgage not only secured the first two notes, but also the entire indebtedness as evidenced by the other two notes, and that it was stipulated therein that upon the failure to pay either one of said notes, the whole mortgage indebtedness should become due and payable and the mortgage should be foreclosed, and that in this respect the said mortgage departed from the agreement and understanding between the complainants and the defendants; that the complainant was entitled to the benefit of the proceeds arising from the foreclosure of said mortgage or from any fund realized from the property described in said mortgage and has the right to have it applied for his benefit on such two notes on which he is surety, in preference to the note on which he is not surety; that the defendants have received out of the proceeds of such mortgaged property a sum sufficient to liquidate the two notes which he signed as surety, and that he is entitled to have such notes cancelled and to be discharged from further liability on account of his said suretyship, and that the stipulation contained in said mortgage as hereinabove stated, providing for the maturity of all the notes upon default being made in the payment of any one of them, was without the knowledge or consent of the complainant.

The prayer of the bill was that a reference be taken before the register to ascertain what had been received

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by the defendants on account of the foreclosure and sale of the mortgage, or any sum specifically received on the resale of the property, "and that the amount so ascertained may be by the order and decree of this court applied for the benefit of complainant as surety on said notes aforesaid, and that if the amount be sufficient that the same may be cancelled and that the judgment obtained thereon against this complainant may also be adjudged and decreed to be satisfied, and if said sum should be less than the amount necessary to satisfy said notes and said judgment, that the same may be applied to the exclusive credit of this complainant *pro tanto* on said notes on which he is surety and the same may be satisfied to that extent." It was also prayed that said judgment against the complainant be marked satisfied and cancelled. The defendants demurred to the bill and prayed to dismiss the same for the want of equity.

Upon the submission of the cause upon the demurrer and motion, the court rendered a decree sustaining the demurrer and motion, and ordered the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

F. A. BOSTICK, for appellant, cited *White v. Life Assn.*, 63 Ala. 419; *Knight v. Curry*, 62 Ala. 404; *Henderson v. Huey*, 45 Ala. 275; *Bank v. Moore*, 3 L. R. 302; *Lehman v. Hughes*, 73 Ala. 302; *Holland v. Kimbrough*, 52 Ala. 249; *Cunningham v. Milner*, 56 Ala. 522; 1 Greenleaf on Evidence, § 279; Code, § 2629.

J. B. TALLY and MARTIN & BOULDIN, *contra*, cited *Morrison v. Bank*, 23 Ala. 39; *Insurance Co. v. Bank*, 17 Ala. 101; *Opp v. Ward*, 21 Ala. 220; *Lyon v. Leboitt*, 3 Ala. 430; 24 Am. & Eng. Ency. Law, 200, note 1; 202, note 5; 18 Am. & Eng. Ency. Law, 234, note 2; 240, note 1.

TYSON, J.—The bill in this cause presents two theories upon which the complainant relies to have the two notes which he executed as surety for the mort-

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gagor, and upon which judgment was recovered against him, before the sale under the power contained in the mortgage was had, satisfied and discharged. The first of these proceeds upon the averment that the terms of the mortgage, to which he is not a party, are not in accordance with the understanding had with him by which he agreed to become bound as surety. This phase of the case, however, is not insisted upon in argument.

The other phase of the bill presents a case for equitable relief, not to the extent of having the entire proceeds derived from the sale under the mortgage applied to a release or satisfaction of the judgment, but only *pro rata*. By the terms of the mortgage, upon default in the payment of the first maturing note, upon which complainant was surety, the whole mortgage debt, including the other one upon which he was surety as well as the two notes executed by the mortgagor alone, became due and payable. In short, the default at maturity of the first maturing note matured the other three, thereby destroying all priority in the distribution of the proceeds of the sale, of one note over another. 2 Jones on Mortgages, § 1703; also §§ 1179-1183.

Again the mortgage conferring no authority upon the mortgagees to apply the proceeds of the sale of the mortgaged property to the payment of any notes to the exclusion of the others, the law applied the proceeds to the entire debt secured by the mortgage. This being true, the complainant as surety has the right to have the proceeds of the sale (sixteen hundred dollars) applied in just proportion to the discharge of that portion of the debt for which he is bound.—*Fielder v. Varner*, 45 Ala. 429; *Orleans Co. Nat. Bank v. Moore*, 3 L. R. A. 302; 2 Jones on Mortgages (5th ed.), § 1706.

It is scarcely necessary, in conclusion, to say that, under no possible aspect of the case is the complainant, and for that matter can never become, entitled to have the proceeds of the sale to Smith by the respondents, as purchasers, applied to a discharge of his liability to them.

The decree of the court dismissing the bill for want

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of equity is reversed, and a decree will be here rendered overruling the motion.

Reversed and rendered.

Christopher v. Stewart.

Proceedings in Probate Court upon Insolvent Estate.

1. *Claim against insolvent estate; objection must be filed within the time fixed by statute.*—Objections to the allowance of a claim against an insolvent estate, upon which issue is to be made up between the claimant and the party interposing the objection under the statute, (Code, § 313), must question the merits or validity of the particular claim for matters separate from its status in respect of its filing; and if such objections are not filed within the time prescribed therefor by the statute, after the declaration of insolvency, all defenses existing or occurring within that period are barred.
2. *Same; statute of limitations.*—The statute of limitations does not run against a claim which has been filed against an insolvent estate; hence where an objection to such claim is based on the statute of limitations and is filed after the time prescribed by the statute for filing objections, the bar created by the latter statute is not avoided by a statement annexed to such objection that the objection arose after the claim was filed.
3. *Same; same; what decree will support an appeal.*—Where objections to a claim against an insolvent estate are filed after the time prescribed therefor by statute and are apparently invalid, an order of the probate court, made in advance of the settlement, striking them from the file, will not support an appeal; the order in such case not being within the purview of subdivision 6, section 458 of the Code, or of other statutes, providing for appeals.
4. *Mandamus; when will not lie from Supreme Court to probate judge.*—The Supreme Court has no power to grant a writ of *mandamus* to the probate judge, when there has been no application to the circuit court or other court having power to grant the writ.

APPEAL from the Probate Court of Etowah.
Heard before the Hon. J. H. LOVEJOY.

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On August 14th, 1900, R. L. Christopher, as guardian of Viva and Estella Stewart, who were the sole heirs and distributees of J. S. Stewart, deceased, filed a petition addressed to the judge of probate of Etowah county, in which he averred that said J. S. Stewart died in Etowah county on February 14, 1892; that letters of administration were granted upon his estate on May 12, 1892; that on November 3, 1892, said estate was declared insolvent, and on December 18, 1893, an administrator of said insolvent estate was appointed and entered upon the discharge of his duties; that the administrator of said insolvent estate has never made any partial settlement of said estate, and that no order, decree or action had been taken in said insolvent estate from December 18, 1893, up to the time of filing the petition; that said estate consists of personal and real estate; that many claims by alleged creditors were filed against said estate after the decree of insolvency; that these claims consisted of open accounts, stated accounts, notes and judgments, but none of them were ever allowed by the court, and they are now barred by the statute or limitations of three and six years.

It was further averred in the petition as follows: "That petitioner files objections to said accounts, which objections have accrued since the filing of said claims, which accounts and objections are hereto attached and marked 'Exhibit A,' and prays that said exhibit be made a part of this petition; that said objections are such as have accrued after the twelve months allowed for filing objections to such claims under Section 313, Code, 1896; Section 2245, 1886."

The prayer of the petition was that after due notice issued to each claimant, the court state an issue to be made up between each of said claimants and the petitioner to try the correctness of said claim, and on final hearing that said claim be stricken from the file. To each of the claims set out in Exhibit A to the petition, the petitioner filed several grounds of objection. Most of these grounds were that the respective claims were barred by the statute of non-claim or by the statute of limitations of three and six years. To some of the

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claims the objection was interposed that they had never been presented to the administrator or filed in the probate court within nine months after the decree of insolvency. In many of the objections to the claims it was stated that "said objection has accrued since said claim was filed."

The creditors set forth in said petition separately moved the court to strike said petition and the objections from the file, upon the following grounds: "1. The petition shows on its face that the objections to said claims come too late. 2. The petition shows on its face that the estate was declared insolvent on November 3, 1893, and the objections were filed to the claims August 14, 1900. 3. The petition shows on its face that the objections to the claim were not made in twelve months after declaration of insolvency, and that said objections did not accrue after twelve months allowed by law for filing objections to said claims. 4. The statute of limitations is no defense to claims against insolvent estates unless raised by objections filed within time allowed by law. 5. The statute of non-claim is no defense to claims filed against insolvent estates unless raised by objections thereto within time allowed by law. 6. It does not negative the fact that prior to declaration of insolvency the claims had been duly filed in office of judge of probate as required by section 133 of Code, 1896."

Upon the submission of this motion, the court rendered a decree sustaining the motion, and ordered the petition and objections struck from the file. From this decree the petitioner appeals, and assigns the rendition thereof as error.

In this court the appellant made a motion for a *mandamus* in the event the decree appealed from would not support an appeal; the *mandamus* to be directed to the judge of probate, requiring him to entertain and pass upon the objections filed by the appellant.

P. E. CULLI, for appellant, cited *Hullett v. Hood*, 109 Ala. 345; *McGhee v. Lomax*, 49 Ala. 131; *Thames v. Herbert*, 61 Ala. 340; *Thornton v. Moore*, 61 Ala. 347;

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Carhart v. Clark, 31 Ala. 396; *Bartol v. Calvert*, 21 Ala. 194; *Moore v. Winston*, 66 Ala. 296; *Chandler v. Wynne*, 85 Ala. 301.

DOETCH & MARTIN, *contra*, cited Code, § 458, subd. 6; § 313; § 3371; *Blake v. Harlan*, 75 Ala. 205; *Cunningham v. Lindsay*, 77 Ala. 510; *Wright v. Dunklin*, 83 Ala. 317; *Chandler v. Wynne*, 85 Ala. 301.

SHARPE, J.—Appellee advances the proposition that an appeal in this case is unauthorized, and we think it is correct. Appellant relies on subdivision 6 of section 458 of the Code, which provides among other things for an appeal “upon any issue as to the allowance of any claim against insolvent estates.” The issues so mentioned are those which may be tried under section 313 of the Code whereunder “at any time within nine months [twelve months under the Code of 1886 here governing as to the limitation of time] after the declaration of insolvency, the administrator, or any creditor, heir, legatee, devisee, or distributee may object to the allowance of any claim filed against the estate, by filing objections thereto in writing; and thereupon the court must cause an issue to be made up between the claimant and objector, in which issue the correctness of such claim must be tried as in an action at law, if required; and if it is found for the claimant to the whole amount thereof, the same must be allowed, and such claimant recover the costs of the trial of such issue; but if against the claimant, the claim must be rejected, and the party contesting recovers the costs of the trial of such issue.” Objections which under this section must be filed within the prescribed time and which may be litigated thereunder to a final determination are those questioning the merits or validity of the particular claim for matters apart from its status in respect of its filing.—*Carhart v. Clark’s Admr.*, 31 Ala. 396; *Bartol v. Calvert*, 21 Ala. 42. Those which go to defaults in filing may be made at any time even on the settlement, for a claim not filed in due time is barred by force of the statute of non-claims and needs not to be contested on special

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issues in order to exclude it from participation in the estate. But where the claim has been properly filed a failure to file objections within the time allowed therefor, cuts off the right to contest it except for defenses arising after that time has expired.—*Thornton v. Moore*, 61 Ala. 347; *Thames v. Herbert*, 61 Ala. 340.

The objections stricken by the order here complained of were filed more than six years after the alleged decree of insolvency. Each objection is accompanied by a statement to effect that it accrued after the claim was filed, but these statements do not bring the case within the exception recognized in the cases last referred to since the exception applies only where the matter of objection arose, not merely after the claim is filed, but after the expiration of the time allowed in ordinary cases for filing objections. Of these objections, those based on the ground that claims after being filed, became barred by the general statute of limitations are without merit. As to claims against insolvent estates, the running of that statute is suspended at the time of their presentation.—*Woodruff v. Winston*, 68 Ala. 412. Declaration of this principle is expressly made in the present Code.—Code, §§ 2817, 2818. Usually the place for the adjudication of such claims is in the probate court, to the jurisdiction of which they are drawn by the decree of insolvency and their filing.

What we have written is not by way of reviewing the probate court's action, but to show the objections were not such as issues ought to have been formed on, and that the order striking out the objections was not made in the trial of or in prevention of any issue of any claim within the meaning of the statute providing for appeals.

Appellant submits a motion, to be acted on if the order is held not appealable, for *mandamus* to require the probate court to entertain and pass on his objection. The power of this court to grant original applications for *mandamus* is confined to cases in which no other court has jurisdiction.—Code, § 3826. The probate court is subject to *mandamus* from the circuit court and other courts of like jurisdiction, and for that reason,

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without regard to any other, the writ cannot be granted here.—*State v. Hewlett*, 124 Ala. 471; *Ramagnano v. Crook*, 88 Ala. 450; *State ex rel. v. Williams*, 69 Ala. 311; *Ex parte Pearson*, 76 Ala. 521; *Ex parte Russell*, 29 Ala. 817.

Let the attempted appeal be dismissed, and the motion for *mandamus* be overruled.

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Bill in Equity to have Deed of Assignment declared Fraudulent and Void.

1. *Creditor's bill to declare void deed of assignment; to what property lien attaches.*—The lien acquired by the filing of a bill by a creditor without a lien, for the purpose of setting aside a conveyance by his debtor, upon the ground of fraud, attaches only to the property embraced in the fraudulent deed or conveyance, and does not attach to any property excepted from the operation of said deed.
2. *Fraudulent conveyance; deed of assignment to be void must be fraudulent in its inception.*—To declare a deed of assignment void by reason of fraud, it must be shown that fraud entered into the assignment at the time of its execution, since no subsequent acts of the party can invalidate an assignment; and, therefore, if a deed of assignment, made by a creditor for the benefit of his debtors, was in its inception *bona fide* and free from fraud, collusive acts of the grantor and assignor subsequent to its execution will not render such a deed void.
3. *Deed of assignment; not fraudulent by excepting therefrom homestead of grantor.*—A deed of assignment in which the grantor conveys all of his property of every kind and description "except his homestead in which he now resides," is not rendered fraudulent by reason of such exception. Such exception is not such a reservation of benefit to the debtor as avoids a conveyance by him; and by such exception the homestead is not conveyed and is subject to legal process by the creditors of the grantor just as it was before the making of the deed of assignment.
4. *Equity pleading; cross appeal necessary to review rulings adverse*

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to appellee.—On an appeal from a decree of the chancery court, a cross appeal or cross assignments of error by the appellees are necessary for the appellees to have any rulings of the court adverse to them reviewed by the Supreme Court.

APPEAL from the Chancery Court of Lauderdale.

Heard before the Hon. WILLIAM H. SIMPSON.

The bill was filed by the appellant, John S. Long, a simple contract creditor, against William P. Campbell and William T. Price, his assignee, and sought to set aside as fraudulent and void a certain deed of general assignment made by said Campbell in August, 1890, to William T. Price, as assignee, and to enforce a lien in behalf of the complainant on the property embraced in the deed of assignment. The assignee having died pending the suit and his estate being insolvent, the case was revived against Samuel S. Broadus, the receiver of the said estate, appointed by the United States court. After the death of the assignee an amended bill was filed praying for the appointment of a receiver of the assigned estate, but no action was taken by the court, and afterwards S. S. Broadus was appointed receiver by the United States court in the case of the Louisville Banking Company against W. P. Campbell, and an amendment to the original bill in this case was filed making him a party.

The original and amended bill show that W. P. Campbell, who was engaged in the business of a private banker at Florence, on the 30th August, 1890, made a deed of general assignment to William T. Price as assignee. Price had been the confidential clerk and cashier of Campbell in his banking business for several years, and was wholly insolvent. The bill alleges that there was no change of possession of the assigned estate, but that W. P. Campbell continued in the sole possession, management and control of the same as fully after the assignment as before. It alleges that he collected and disbursed the assets of the assigned estate as he saw proper, paying and compromising with certain creditors and leaving others unpaid; that at the time of his assignment he was indebted to complainant in the sum of five thousand dollars by written guar-

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anty. The facts briefly averred as to this indebtedness were as follows: On the 2d of April, 1890, the Foster Manufacturing Company, a corporation engaged in business at Florence, executed to complainant its two notes for five thousand dollars, each payable respectively in 90 days and four months. These notes were given in renewal of notes of similar amount executed by the said Foster Manufacturing Company, payable to F. H. Foster, and by him endorsed to complainant. These notes were not paid on maturity, and complainant agreed to an extension of 90 days and 4 months provided they were endorsed by all of the directors of the Foster Manufacturing Company, among whom was W. P. Campbell, who was then a private banker enjoying high credit. Said Campbell was not only director, but a large stockholder of the corporation, and in addition to his own stock had a large amount of stock of the company pledged with him for debts due by F. H. Foster and the company. After some negotiations it was agreed that all the directors except Campbell should endorse the two notes, Campbell making a written agreement that he would pay the note at maturity at 4 months if the company failed to do so. A copy of this written agreement is attached as an exhibit to the bill. Default was made in the payment of the note, and Campbell having failed in business in the meanwhile, declined to pay as he had agreed. The bill alleges that the deed of assignment was fraudulent on its face as well as made to hinder, delay and defraud creditors; that by the express terms of the deed Campbell excepted from its operation the homestead in which he then lived, which complainant alleges was of great value, worth at least ten thousand dollars. The deed of assignment, which was attached as an exhibit to the bill, was as follows down to the *habendum* clause: "This deed of conveyance, executed at Florence, Alabama, on the 30th day of August, 1890, by and from William P. Campbell, party of the first part, to and with Wm. T. Price, party of the second part, witnesseth: That whereas said party of the first part in the transaction of the business as a banker at Florence, Alabama, under the firm name of W. P. Campbell & Co., has become in-

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volved to such an extent that he is not able to meet his obligations as they mature, and is anxious to provide for the payment of all amounts due by him to his creditors: Now, in consideration of the premises, and the payment of one dollar cash in hand by said party of the second part to said party of the first part, the receipt whereof is hereby acknowledged, said party of the first part does hereby give, grant, bargain, sell and convey to said party of the second part all of the property, real, personal and mixed, held, owned or possessed by said party of the first part, whether in his individual name or in his firm name of W. P. Campbell & Co., or jointly with others, including all notes, accounts and evidences of debt, and every species of property whatever, except his homestead in which he now resides." The bill then averred that this reservation of property, which was far in excess of the exemption allowed by law, made the deed fraudulent and void as to creditors. The bill further averred that no inventories or schedules were ever filed by the assignee of Campbell, that Campbell collected and appropriated the assets to his own use, and that no dividend was ever declared; that at the time of the assignment the property was considered of great value, about \$200,000; and that no settlement of any kind was made by the assignee with the creditors and the assignee died insolvent. It is alleged that Price was a mere dummy; Campbell exercising full control and dominion over the estate, and collecting and appropriating the assets to his own use or in the settlement of certain favored claims. The bill avers that the said assignee was merely nominally the assignee, but that "yet in fact and in truth he has since the said deed was executed continued to be as he was prior to that time, merely the clerk of W. P. Campbell, exercising no more control since than he did before its execution over the property or assets of said W. P. Campbell, and takes no action except as directed and controlled by the said William P. Campbell." The bill further alleges that although expressly required by the pretended deed of trust to employ clerical aid and make accurate schedule of the assets and liabilities of the

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said Campbell, the said assignee failed and refused to comply with the provisions of the deed or to file schedule as required by law in the probate and chancery courts of Lauderdale county, and that the failure to so comply with the requirements of the deed and the provisions of law was to aid the said Campbell and to benefit him; that the creditors of the estate have been kept in complete ignorance of the condition of the estate and to enable the said Campbell to speculate upon the creditors.

The prayer of the bill was as follows: "That the said defendants may make a full and true discovery and disclosure of and concerning all and singular the transactions and matters aforesaid; that the deed in this bill mentioned from Wm. P. Campbell to William T. Price, of date August 30, 1890, be declared void and may be vacated and annulled; and that it be referred to the register to take and state an account of what would be a reasonable attorney's fee for collecting said note and a decree rendered in favor of orator for the amount of said note, made exhibit A to this bill, and a lien declared in favor of orator on so much of the property in said deed described as may be necessary to discharge orator's claim or on the homestead of said W. P. Campbell before described, and a sufficient amount of said property in said deed mentioned or shown to have come into the hands of said William T. Price as such pretended assignee, or trustee, necessary to discharge orator's claim be sold, or that said homestead be sold for payment of same."

An answer was filed by Campbell and Price. The execution of the agreement or guaranty was admitted. It was claimed, however, that after the endorsement of the note guaranteed the words "we hereby waive all exemption" was interpolated. In the language of the answer it was alleged "that after the notes went into the hands of the complainant the writing on the back of the said note was so altered as to discharge said endorsers from liability without the consent of the said Campbell, thereby discharging him." All fraud was denied. It was claimed that the exemption of the homestead was simply intended to reserve such homestead

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as the law exempted. It was alleged that Campbell's control of the property after the assignment was with the consent of certain creditors expressed at a meeting held after the execution of the deed. It was admitted that Campbell had purchased, property, settled or compromised with certain creditors and exercised control over the assigned estate, and that no schedules were filed.

A demurrer to the effect that the guaranty showed no consideration and was, therefore, void under the statute of frauds was interposed, and this demurrer was overruled by the court.

S. S. Broadus, as receiver, filed an answer and demurrer to the original and amended bills.

The seventh ground of demurrer filed by Broadus was that the bill as amended failed to show any legal or equitable ground why the complainant should be preferred in the payment of the debt alleged to be due by Campbell over the other creditors of said Campbell. It is unnecessary to set out in detail the facts as adduced.

On the submission of the cause on the pleadings and proof, the chancellor decreed that the defendant, W. P. Campbell, was indebted to the complainant on account of his guaranty to pay the note of the F. H. Foster Manufacturing Company; that said guaranty was not within the meaning of the statute of frauds, and that he was not released and discharged because of the entry of the clause waiving exemptions, this having been done with Campbell's knowledge and consent; that it does not appear that the execution and acceptance of the deed of assignment was intended to hinder, delay or defraud the creditors of W. P. Campbell; that the subsequent mismanagement and squandering of the assets of the assignor and assignee at most only gave the creditors the right in equity to have the property placed in the hands of a receiver of the court for preservation and proper application; that the exception from the deed of assignment of the assignor's homestead did not render said deed invalid, and the complainant is entitled to no lien thereon. It was also

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decreed that the seventh ground of demurrer interposed by Broadus as receiver be sustained. It was further ordered that a reference be held by the register to ascertain and report the amount due complainant from the defendant. This reference was held and the register made his report of the amount due from W. P. Campbell. Before the hearing of this report, W. P. Campbell filed his plea setting up that he had been adjudged a bankrupt. Thereupon the chancellor rendered his decree suspending the further proceedings until the Supreme Court, to which had been appealed the case in which he had been adjudged a bankrupt, should render its decision in said case.

The complainant appeals and assigns as error the decree declaring that the deed of assignment was void, and that the complainant was entitled to no lien, and assigns the rendition of this decree as error.

EMMET O'NEAL and THOMAS R. ROULHAC, for appellant.—That the bill in this case, and the testimony taken in support of it, clearly demonstrate the illegal and fraudulent disposition of the property embraced in the assignment; the continued control and disposition of the property by the assignor, the debtor; the use of the property to pay certain creditors, to the exclusion of others, equally as valid and meritorious; the disappearance of the assets of the trust fund; the absence of security on the part of the assignee named in the deed, and his failure to exercise his functions and discharge his duties as assignee; and the reservation by the debtor, for his own benefit, of valuable property rights over and above the exemptions allowed by law, is too plain for discussion. The deed, on its face, establishes, in connection with the undisputed proof of the value of the property, the excessive reservation of exemptions. All of these are elements and *indicia* of fraud; each of them sufficient in itself to entitle the complainant below to the protection of a court of equity; and that of the reservation of any interest, beyond that, in quantity and value, which the law confers as exempt from the collection of debts, is a conclusive one. And this is so notwithstanding the most solemn assevera-

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tions of an absence of any intent to defraud, on the part of the debtor; because such a reservation necessarily has the effect of hindering and delaying the creditor; and because it operates for the benefit of the debtor, when his deed purports to yield up his estate for the benefit of his creditors.—*Bowman v. Draughan*, 3 Stew. 243; *Pulliam v. Newbury*, 41 Ala. 168; *Terrell v. Green*, 11 Ala. 213; *Tatum v. Hunter*, 14 Ala. 537; *Corprew v. Arthur*, 15 Ala. 531; *Huggins v. Perrine*, 30 Ala. 396; *Rives v. Walthall*, 38 Ala. 329; *Lukins v. Aird*, 73 U. S., (6 Wall.) 78; *Howe Machine Co. v. Claybourn*, 6 Fed. Rep. 440.

Wherever the deed of assignment contains any provision for the benefit of the assignor, or his family, which thereby deprives the creditors of anything, to which the law entitles them, such deed is construed to be void on its face.—*Gazzam v. Poyntz*, 4 Ala. 374; *Henderson v. Downing*, 24 Miss. 106; *Holmes v. Marshall*, 78 N. C. 262; *Moore v. Hinnant*, 89 N. C. 455; *Gardner v. Commercial Bank*, 95 Ill. 298.

SIMPSON & JONES and JOHN T. ASHCRAFT, *contra*. No fraud or collusion between Campbell and Price is shown to have entered into the execution and acceptance of the deed of assignment, and, even if there was subsequent collusion between them, it could not affect the security of creditors by virtue of said deed.—*Tompkins v. Wheeler*, 16 Pet. U. S. 119; *Martin v. Funk*, 31 Am. Rep. 677; *Klapp v. Shirk*, 13 Pa. St. 589; 1 Am. & Eng. Ency. of Law, (1st ed.), 869.

The exception in the deed does not make an excessive claim, being intended only to save to himself a legal homestead and to show his right by asserting his residence; but an excessive claim of homestead exemption does not constitute a fraud upon creditors.—Code, § 2046; *Kennedy v. First National Bank*, 107 Ala. 170; *Richardson v. Stringfellow*, 100 Ala. 416; 3 Am. & Eng. Ency. Law (2d ed.), 43; *Lawrence v. Norton*, 15 Fed. Rep. 853; *Frank v. Myers*, 97 Ala. 437.

DOWDELL, J.—In a bill by a creditor without a lien filed for the purpose of setting aside a conveyance

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by his debtor on the ground of fraud (Code, § 818), the lien acquired by the filing of the bill attaches only to the property embraced in the fraudulent deed or conveyance.

If the deed of assignment from Campbell to Price, made for the benefit of the grantor's creditors, was in its inception *bona fide* and free from fraud, collusive acts of the grantor and assignee subsequent to its execution would not render it void. "The fraud must have entered into the assignment at the time it was made. No subsequent acts of the parties can invalidate an assignment made *bona fide*."—1 Am. & Eng. Ency. Law (1st ed.), 869, and notes citing authorities. The deed of assignment conveyed all of the grantor's property of every kind and description "except his homestead in which he now resides." It is contended by counsel for appellant that this was such a reservation of benefit to the debtor grantor as would avoid the conveyance. It is perfectly clear that by this exception in the deed, the homestead was not conveyed. It is equally clear that the property excepted from the deed and not conveyed, was subject to legal process by the creditor just as it was before the making of the deed of assignment. There was nothing in the deed to hinder or delay the creditor in taking any legal proceeding to subject the excepted property to the payment of his debt, which he had prior to its execution. There is a plain and evident distinction between the reservation of a benefit and an exception in a deed of assignment. The reservation, that taints the deed and avoids the conveyance, whether expressed in the contract or secretly made, is one of benefit to the grantor in the property conveyed. There was no such reservation in the present case; no benefit was reserved to the grantor in anything conveyed.—*Frank et al. v. Myers et al.*, 97 Ala. 437. There is nothing in the face of the deed to render it void. The chancellor's finding that there was no actual fraud in the transaction at the time of the execution of the deed of assignment, we think is fully supported by the evidence. Incapacity, or mismanagement of the trust estate, on the part of the assignee, was ground for his removal as trustee, at the instance

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of the creditor, but not ground for avoiding the deed of assignment.

The question as to the validity of the complainant's claim, which is discussed at length by counsel for appellees, is not properly before us for consideration on this appeal. There is neither a cross-appeal, nor cross-assignments of error by appellees, and in order for the appellees to have any rulings of the court adverse to them, reviewed here, it was necessary for them to prosecute an appeal, or to cross-assign errors under the rules.

The decree of the chancellor is affirmed.

Alabama Great Southern Railroad Co. v. Hall.

Action against a Railroad Company to recover Damages for Injuries to a Horse.

1. *Action against railroad company for injury to a horse; sufficiency of complaint.*—In an action against a railroad company, a complaint which "claims of the defendant the sum of seventy-five dollars as damages for that on or about the day of August, 1900, defendant negligently caused one horse, the property of plaintiff, to run into a trestle on defendant's railroad and thereby injured it so that it was worthless," states a cause of action, and is not subject to demurrer upon the ground that it fails to state or show that the defendant owed the plaintiff any duty in respect of the animal, and that its averments of negligence were too vague and indefinite.
2. *Same; duty of engineer upon seeing horse running in front of train.*—Where a horse frightened by an advancing train ran directly towards a trestle of a railroad in front of a train, and the surroundings were such that he would probably continue his flight along the track and into the trestle, if the train continued to advance, the engineer, seeing these things, owes the owner of such horse the duty of stopping the train and thereby removing the cause of the flight of the animal; and the railroad company is liable for injuries resulting to the horse, if the engineer negligently fails to discharge this duty.

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3. *Same; same; case at bar.*—In an action against a railroad company to recover damages for injuries to a horse which ran into a trestle of the defendant's railroad, where there was evidence tending to show that the train on the defendant's road was moving towards a trestle on the roadway, and plaintiff's horse was running on the track between the engine and the trestle, apparently frightened by the train, that the track at that place was upon an embankment, several feet high, and the train was 30 to 50 yards behind the horse and going faster than he was, and that the engineer was aware of the situation and did not seasonably stop or check the speed of the train, which if he had done the horse would not have continued his flight into the trestle, and the injury to him would have been averted, the general affirmative charge requested by the defendant is properly refused.
4. *Same; same; what necessary to authorize plaintiff's recovery.* In such a case, before the plaintiff is entitled to recover, it is necessary for the jury to be reasonably satisfied that the horse ran into the trestle in consequence of the continued advance of the train.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. JAMES A. BILBRO.

This was an action brought by the appellee, A. L. Hall, against the Alabama Great Southern Railroad Company, to recover damages for injuries to a horse. The plaintiff claimed damages under separate counts for injury to a horse and a mule, but the court gave the general affirmative charge for the defendant as to the damages claimed for the mule.

The count of the complaint claiming damages for the horse, and the substance of the demurrers to said count are set out in the opinion. The recital in the judgment entry relative to the rulings upon the demurrer to this count of the complaint, which was the amended complaint, was as follows: "The defendant demurs to amended complaint, and on consideration of the court the demurrer is overruled."

On the trial of the cause it was shown that the train which frightened the horse of the plaintiff was a local freight train going north. The evidence for the plaintiff tended to show the following facts: The train had backed into a switch to get a car. The horse in question was on the side track and ran along the side ahead

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of the train for a short distance, about 75 yards to the main line. When the horse was on the north side track the train was going toward him and was about 50 yards off. The horse then ran up the line to the trestle, ran on the trestle and fell through it. The trestle was from 30 to 35 yards north of the point where the side track comes into the main line. The horse was frightened by the train and ran along the track ahead of it until he fell into the trestle. The engineer did not blow the whistle or ring the bell of the engine. The engineer began checking the train before the engine got on the main line, but the engine and cars were moving when the horse fell in the trestle. When the train stopped, the engine was on the main line and the tender and rest of the train were on the switch, and the engine was about 30 yards from the horse. The engine did not come in contact with the horse and did not get nearer to him than about 30 yards. The engine was going faster than the horse and was gaining on him. The fall of the horse was proven, and it was shown that he was worthless after the accident. The engineer on said train, as a witness in behalf of the defendant, testified that he saw the horse start down the side track towards the main line; that at that time the train was running at five or six miles an hour, and should have been stopped in from 15 to 30 feet; that the horse was about 200 feet in front of the engine and the engine never got closer than 150 feet to him, and when he stopped the engine, it had just gotten on the main line. It was shown that the main track was upon an embankment. The engineer testified that the embankment did not have precipitous sides, but was an ordinary embankment. A witness for the plaintiff testified that when the mule went down the embankment he partly slid down.

The court in its oral charge to the jury instructed them as follows: "When the animals got on the main line, there are two matters for the jury to consider, first, were the animals in such a state of fright at that time, that they would have fallen into the trestle anyway, if it reasonably appears that the animals would

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have continued in their flight and fallen into the trestle whether the train moved further or not, then the plaintiff can not recover, (but if that does not reasonably appear, then when the animals got on the main line, if the engineer saw that they were headed toward the trestle, it became the duty of the engineer on perceiving the animals on the track to take steps to stop the train, and if the engineer fail to do so and this train ran on and the horse ran into the trestle, the plaintiff is entitled to a verdict, if the jury should also believe from the evidence that the failure of the engineer to check his train contributed to running the horse into the trestle)." The defendant separately excepted to that portion of the charge copied above which is within the parentheses, and also separately excepted to the court's refusal to give the general affirmative charge requested by it.

There were verdict and judgment for the plaintiff, assessing his damages at \$81. The defendant appeals, and assigns as error the rulings of the court upon the pleadings and the giving of the portion of the court's oral charge to which the defendant excepted, and the refusal to give the general affirmative charge requested by the defendant.

AMOS E. GOODHUE, for appellant, cited *Stanton v. L. & N. R. R. Co.*, 91 Ala. 382; *Oxford Lake Line Co. v. Stedham*, 101 Ala. 376.

DAVIS & HARALSON, *contra*, cited *Mary Lee C. & R. Co. v. Chambliss*, 97 Ala. 171; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 307; *Western R. Co. v. Lazarus*, 88 Ala. 453; *Oxford Lake Line Co. v. Stedham*, 101 Ala. 376.

McCLELLAN, C. J.—Action by Hall against the railroad company. The complaint is as follows: "Plaintiff claims of the defendant the sum of seventy-five dollars as damages for that on or about the . . . day of August, 1900, defendant negligently caused one horse, the property of plaintiff, to run into a trestle on defendant's railroad, and thereby injured it so it was worthless." (There was also a mule in the com-

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plaint and in the trestle, but as no injury to it was proved and the court charged affirmatively for defendant as to the damages claimed as to it, we pretermitt the mule.) There was a demurrer to the complaint on the grounds that it failed to aver or show that defendant owed the plaintiff any duty in respect of the animal and that its averment of negligence was too vague and indefinite. The demurrer was overruled, and properly, under the authority of *Western R'y. Co. v. Lazarus*, 88 Ala. 453; *Oxford Lake Line Co. v. Stedham*, 101 Ala. 376; and *Louisville & Nashville Railroad Co. v. Marbury Lumber Co.*, 126 Ala. 237. (We do not decide whether there was a judgment entry as to this demurrer.)

On the evidence before them it was open to the jury to find that defendant's train was being moved forward toward a trestle, that plaintiff's horse was on the track between the engine and the trestle running, in apparent fright of the train, toward the trestle, that the track along which the horse ran was on an embankment five or six feet high, the sides of which while not "precipitous" were yet at such an incline as that a horse in attempting to go down them would partially slide, that the train was from thirty to fifty yards behind the horse and going faster than he was—"gaining on him,"—that the engineer was aware of the situation but did not seasonably stop or check the speed of his train, that had he done so the horse would not have continued his flight onto and into the trestle, and the injury to the animal would have been averted. In view of the phase of the case presented by these tendencies of the evidence, the court properly refused the affirmative charge requested by the defendant. Seeing the horse running directly toward the trestle in fear of the advancing train, the surroundings being such as that he would probably continue his flight along the track into the trestle if the train continued to advance, the engineer owed the plaintiff the duty of stopping the train and thereby removing the cause of the flight of the animal, and if he negligently failed to discharge this duty and in consequence the horse was injured, the defendant is liable.

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Of course, it was a matter of inference for the jury whether the horse would or not have continued his flight into the trestle had the train been stopped when it should have been; and it was necessary, of course, for the jury to be reasonably satisfied that he ran into the trestle in consequence of the continued advance of the train before they were authorized to return a verdict for the plaintiff. That part of the oral charge to which an exception was reserved, taken as a whole and in connection with its context is not an erroneous statement of law in this regard, for while in its opening clause it is open to a construction which might authorize a verdict for the plaintiff upon the jury not being reasonably satisfied that the horse would have gone into the trestle in any event, when it was necessary for them to find that he would not have gone there but for defendant's negligence, yet the last clause corrects this faulty tendency by requiring the jury to find for plaintiff only in the event the failure to stop the train contributed to the injury.

Nor, in our opinion, was the oral charge bad when referred to the evidence, for asserting that when the horse got on the main line and the engineer saw that he was headed for the trestle, it became the duty of the engineer to take steps to stop his train. The evidence is undisputed that the horse was frightened by, and in flight from, the train and that he was running on a considerable embankment, his easiest route of flight, but for the trestle being on and along the track. On these facts there was such obvious danger of the horse running into the trestle from the time he got on and began to run along the main track as to impress the mind of an ordinarily prudent man in the place of the engineer with the necessity of removing the cause of the horse's fright and flight by stopping the pursuing engine, and it then became the engineer's duty to stop it.

We find no error in the record, and the judgment must be affirmed.

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Statutory Trial of the Right of Property.

1. *Bill of exceptions; when will not be considered on appeal.*—When the bill of exceptions is signed by the presiding judge in vacation, and there does not appear in the record that an order was made by the court in term time authorizing it to be signed after the adjournment of the court at which the trial was had, and there appears no agreement of counsel as provided by statute, such bill of exceptions will not be considered by the appellate court for any purpose; and the recital at the close of said bill of exceptions that it was tendered and approved “within the time prescribed by the court in which the bill of exceptions may be signed,” amounts to nothing more than the statement of the judge, and is insufficient to supply the omission of an order of the court.
2. *Trial of the right of property; sufficiency of verdict.*—While under the provisions of the statute it is the duty of the jury on the trial of the right of property to assess in their verdict the value of each item of property involved separately, if practicable, (Code, § 4143), if there appears no evidence as to the value of each item of the property, and it is recited in the verdict of the jury that the jury find “the issue in favor of the plaintiff for the property described as per agreement,” the fact that the jury fail to assess in their verdict each item of property in controversy separately, does not render such verdict insufficient to support a judgment in favor of the plaintiff: the court presuming under such circumstances that it was either impracticable for the jury to assess such items of the property separately, or that the failure to do so was in accordance with the agreement referred to therein.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. A. H. ALSTON.

This was a statutory trial of the right of property between the appellee, J. J. Arnold & Co., as plaintiff in attachment, and the appellant, the Massillon Engine & Thresher Company, as claimant, and was instituted in

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the following manner: J. J. Arnold & Co., as plaintiffs in attachment, sued out a writ of attachment against Morford & Whitehead, and caused the writ to be levied upon the property in controversy. Thereupon the Massillon Engine & Thresher Company, made affidavit and bond and interposed a claim to said property, setting up the fact that the property levied upon under the writ of attachment was not the property of Morford & Whitehead, but was the property of the claimant. Upon the interposition of this claim, issue was formed as directed under the statute, and on this issue the trial was had.

It is unnecessary to set out the facts of the case, as under the rulings of the court the bill of exceptions can not be considered. The facts as to the signing of the bill of exceptions are sufficiently stated in the opinion.

The verdict of the jury, as shown by the judgment entry, was as follows: "We, the jury, find the issue in favor of the plaintiff for the property described as per agreement, one saw mill, consisting of boiler, engine and fixtures levied on by the sheriff, and described in said levy, or the alternate value of said saw mill, which value is assessed by the jury at the sum of eight hundred and fifty dollars." Upon this verdict judgment was rendered for the plaintiff. The claimant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

VON L. THOMPSON, for appellant.—The verdict of the jury was insufficient to support the judgment.

Under section 4143 of the Code the law requires that as far as is practicable, it is the duty of the jury to assess the value of each article separately. The jury failed to do this and the judgment rendered on that verdict is error, and this alone ought to work a reversal of the case. It is sufficient to refer to citations of authorities under the above section in the Code.

J. E. BROWN, *contra*.

TYSON, J.—What purports to be a bill of exceptions in this record was signed by the presiding judge in va-

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cation. Nothing appears in the record of the court below showing that any order was made by the court in term time, authorizing a bill of exceptions to be signed after the adjournment of the court at which the trial was had. The recital at the close of what purports to be the bill of exceptions: "Tendered and approved, this 15th day of April, 1901, within the time prescribed by the court in which the bill of exceptions may be signed," amounts to nothing more than the statement by the judge and is insufficient to supply the omission of so important requirement as the making of an order by the court. It cannot, therefore, be considered for any purpose.—*Dantzler v. Swift Creek Mill Co.*, 128 Ala. 410.

With the paper purporting to be a bill of exceptions eliminated, all the assignments of error, except the 13th, are disposed of since they relate exclusively to exceptions reserved upon the trial to the rulings of the court upon the admission and exclusion of testimony and the refusal of written charges. The 13th assignment is predicated upon the failure of the jury in their verdict to assess each item of property in controversy separately. It is true that in suits involving the trial of right of property it is made the duty of the jury, *if practicable*, by their verdict to assess the value of each item of property involved separately.—Code, § 4143, and authorities cited thereunder. It is also true, if it is *impracticable* to assess the value of each piece of property involved, the jury are under no duty to do so. In the absence of all evidence on this point, we are bound to indulge the presumption that the jury did what is required of them. It is but fair to assume that they found it impracticable to assess each item of the property found to belong to the plaintiff, being a "saw mill, consisting of boiler engine and fixtures." Besides there appears by the recitals in the verdict to have been an agreement by which the jury were to be governed in their findings. The judgment entry shows that there was a contest. It recites an appearance in person by plaintiff and claimant and their respective attorneys, that the issue was made up under the direction of the court upon which there was a joinder. Clearly the only inference to be drawn

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is that the agreement referred to in the verdict was entered into by the respective parties litigant or their attorneys during the progress of the trial, and that it had reference to the character of verdict the jury were to render. As the record at which we are authorized to look, does not contain a copy of this agreement, and nothing to the contrary appearing, we feel safe in indulging the presumption that it covered the very defect in the verdict, if it exists, now insisted upon. Doubtless the jury carried out the terms of that agreement whatever they were; at least we will so presume. The burden being upon appellant to affirmatively show error, we cannot presume its existence. On the contrary, the presumption must be indulged in favor of the correctness of the judgment appealed from.

Affirmed.

Gadsden & Attalla Union Railway Co. v. Julian, Admr.

*Action against Railroad Company to recover Damages
for killing Plaintiff's Intestate.*

1. *Action against railroad company; sufficiency of complaint.*—In an action against a railroad company, a count of the complaint in the following words: "The plaintiff who sues as the administrator of the estate of James C. Julian, deceased, claims of the defendant corporation the sum of twenty-five thousand dollars as damages for the negligent killing of plaintiff's intestate, a minor less than eleven years of age, by running against and over the plaintiff's intestate with an electric car, which said killing occurred on or about the 22d day of June, 1900," is insufficient and subject to demurrer.

APPEAL from the City Court of Gadsden.

Tried before the Hon. JOHN H. DISQUE.

This was an action brought by the appellee, R. W. Julian, as administrator of the estate of James C. Julian, deceased, against the Gadsden & Attalla Union Rail-

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way Co. The complaint contained four counts. On the present appeal it is unnecessary to set out the second and third counts. The first and fourth counts of the complaint were as follows: "First. The plaintiff, who sues as the administrator of the estate of James C. Julian, deceased, claims of the defendant corporation the sum of twenty-five thousand dollars as damages for the negligent killing of plaintiff's intestate, a minor, less than eleven years of age, by running against and over plaintiff's intestate with an electric car, which said killing occurred on or about the 22d day of June, 1900." Fourth. The plaintiff, who sues as the administrator of the estate of James C. Julian, deceased, claims of the defendant the sum of twenty-five thousand dollars as damages for the negligent killing of plaintiff's intestate, a minor, less than eleven years of age, by running against him with an electric car, which said killing occurred on or about the 22d day of June, 1900, in Etowah county, Alabama."

To the first and fourth counts of the complaint the defendant separately demurred upon the following grounds: 1. They show no duty the defendant owed the plaintiff which it negligently failed to perform. 2. They show that plaintiff's intestate was a trespasser on defendant's track, and they aver nothing more than simple negligence in his killing. 3. They do not show the particular act of negligence complained of. 4. They do not state the particular acts or matters which constituted the willful, wanton or intentional negligence complained of. 6. They are too vague and uncertain. 7. They fail to allege any facts which show willful, wanton or intentional negligence.

There is a recital in the record that "defendant demurs to the third count on the same grounds set out in his demurrer to the second count, assigning each ground separately," but the grounds of the demurrer to the second count do not appear in the record. The court overruled the defendant's demurrers to the complaint. On the present appeal the defendant assigns as error the court's overruling its demurrers to the complaint.

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DORTCH & MARTIN and W. J. BOYKIN, for appellants, cited *Cheuning v. Ensley R. R. Co.*, 93 Ala. 27; *A. G. S. R. R. Co. v. Moorers*, 116 Ala. 642; *Jefferson v. Bir. R. & E. Co.*, 116 Ala. 294.

GOODHUE & BLACKWOOD, *contra*, cited *Ensley R. R. Co. v. Cheuning*, 93 Ala. 24; *L. & N. R. R. Co. v. Jones*, 83 Ala. 376; *M. & M. R. R. Co. v. Crenshaw*, 65 Ala. 566; *S. & N. R. R. Co. v. Thompson*, 62 Ala. 494; *Gov. St. R. R. Co. v. Hanlan*, 53 Ala. 80.

SHARPE, J.—Counts 1 and 2 of the complaint are each wanting in particularity of averment, in that they fail to show either that plaintiff's intestate when injured was not a trespasser on defendant's track, or that defendant's servants in charge of the train became aware of his perilous position on the track and were thereafter guilty of actionable misconduct.—*Ensley R. R. Co. v. Cheuning*, 93 Ala. 25; *Savannah & W. R. R. Co. v. Meadors*, 95 Ala. 137; *Highland Ave. & B. R. R. Co. v. Robbins*, 124 Ala. 113; *L. & N. R. R. Co. v. Brown*, 121 Ala. 221.

A child as well as an adult may be a trespasser; and ordinarily a railroad company is under no more obligation to keep a lookout for children who, without enticement for which it is responsible, may go on the track at a place they have no right to be, than to look out for adults.—*Highland Ave. & B. R. R. Co. v. Robbins*, *supra*; *A. G. S. R. R. Co. v. Moorers*, 116 Ala. 642; 3 Elliott on Railroads, § 1259. Therefore, the averment of infancy contained in counts 1 and 4 does not supply the facts essential to show a duty breached. The demurrers to these counts respectively should have been sustained.

The demurrer to count 3 fails for want of specific grounds, since it merely adopts the grounds in what is referred to as the demurrer to count 2, and no demurrer to count 2 is found in the record.

Reversed and remanded.

[Hood *et al.* v. Southern Railway Co.]**Hood *et al.* v. Southern Railway Co.***Bill in Equity to enjoin Ejectment.*

1. *Injunction; railroad company can not enjoin ejectment for right of way which has not been paid for, without offering to compensate the owners.*—Where a right of way for a railroad has not been acquired by the railroad company, either by valid conveyance or under condemnation proceedings for such purpose, the railroad company can not maintain a bill to enjoin an action of ejectment brought against it by the owners of the land over which the road was constructed, without offering in the bill to do equity by paying compensation for the lands so used for a right of way; and this principle obtains although the owners of the land may have had knowledge of the location and construction of the railroad company's track across its lands, and allowed it to expend large sums of money for the purpose, without interference.
2. *Same; fact that some of the owners of the property had conveyed their interest immaterial.*—In such a case, the necessity for offering to do equity by the complainant railroad company is not removed by the fact that some of the owners may have subsequently sold their interest in the lands to persons unknown to the complainant; since the offer to make compensation should be made to the original owners of the land.
3. *Equity pleading; bill does not lie from interlocutory decree on motion to strike parts of the bill.*—An appeal does not lie from an interlocutory decree on a motion to strike parts of the bill, and the fact that the ruling on such motion is contained in an interlocutory decree on demurrer does not confer jurisdiction on the appellate court to review the rulings on the motion to strike.

APPEAL from the Chancery Court of Etowah.

Heard before the HON. RICHARD B. KELLY.

The bill in this case was filed by the appellees, the Southern Railway Company, against the appellants, J. C. Hood, and others, on April 23, 1898. As amended the bill avers substantially the following facts: In 1887 the Rome & Decatur Railroad Company entered upon

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the land in question, and built its road across a strip of land described in the bill; this strip of land being used by said company as its right of way and being 100 feet wide and 3,800 feet long. The plaintiff is the legal successor in interest of the Rome & Decatur Railroad Company. Since the Rome & Decatur Railroad was built the complainant and its predecessor in ownership have spent large sums of money "in improving repairing and keeping up said road bed and right of way, which was necessary for the performance of its business." The complainant is compelled to have the use of the strip of land in order to operate its railroad. From the completion of the road in 1887 the complainant and the companies under which it claims have constantly operated said railroad, transporting freight, passengers and the United States mail, and "during all of said time the respondent, though knowing of such operation and maintenance of said railroad over said lands and the constant expenditure of money on improvements and repairs on the same, by orators and those under whom it claims, yet has never protested against the same until the 4th day of November, 1896, when they brought an action of ejectment against orator for the recovery of said lands."

It was then averred in the bill as amended "that it is informed and believes and on such information and belief charges that before the filing of this bill some of the defendants parted with their interest in said lands to W. H. Hood or to some other person unknown to complainant and have no further interest in the same; that the names of the defendants so disposing of said interests are unknown to complainant; that complainant is ready and willing and here offers to pay to such of respondents as may be entitled thereto compensation for the lands taken and occupied by it as such right of way and for the injury done to the adjacent lands, such as they may be entitled to in equity and good conscience, but can not make such compensation without first knowing who may be entitled thereto."

As part of the paragraph of the bill from which the quotation just above made is taken, and to the end of knowing who might be entitled to compensation, the

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complainant propounded several interrogatories to the respondents.

The prayer of the bill was that the action of ejectment brought by the respondents as averred in the bill, to recover the strip of land in question, should be enjoined, and that the respondents be decreed to be estopped from setting up any claim of title to said strip of land, and that the injunction be made perpetual.

To the bill as amended the respondents demurred upon the ground that the offer to do equity was insufficient and it did not contain a sufficient offer to make compensation. The defendants also moved the court to strike out the interrogatories contained in the bill as amended, upon the ground that they were impertinent, and were not warranted by any statement made in the bill.

Upon the submission of the cause upon the demurrer and the motion to strike the interrogatories, the chancellor overruled both the demurrer and the motion to strike the interrogatories. The respondents appeal, and separately assign as error that part of the decree overruling the demurrer and that part of the decree overruling the defendant's motion to strike the interrogatories from the bill.

DORTCH & MARTIN, for appellant, cited *S. & N. Ala. R. R. Co. v. A. G. S. R. R. Co.*, 102 Ala. 236; *Evans v. S. & W. R. Co.*, 90 Ala. 54; *Pique v. Arendale*, 71 Ala. 91; *Hendricks v. Kelly*, 64 Ala. 388; *Franklin v. Pollard Mill Co.*, 88 Ala. 318.

BURNETT & CULLI, *contra*.

DOWDELL, J.—If the respondents owned the lands at the time of the taking by the Railroad Company, their right to compensation is not affected by a subsequent conveyance of their title in the lands to another.—*S. & N. Ala. R. R. Co. v. A. G. S. R. R. Co.*, 102 Ala. 236; *Evans v. S. & W. R'y Co.*, 90 Ala. 54.

To give the bill equity, the offer to make compensation for the lands taken by the Railroad Co. should

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be full and complete and unconditional. The bill as amended, which was demurred to, did not do this, but coupled with the offer to make compensation a condition, and one that was wholly immaterial. The complainant is bound to know under the law, that the owners of the land at the time of the trespass are the ones entitled to compensation in damages, and the fact that some of the owners may have subsequently sold their interest in the lands to persons unknown to the complainant, furnishes no excuse for a failure to offer to make compensation to the original owners, since their vendees acquired no right to such compensation. The demurrer to the bill as amended should have been sustained.

The statute does not authorize an appeal from an interlocutory decree on a motion to strike parts of a bill, and the fact that the ruling on such is contained in an interlocutory decree on the demurrer, from which latter decree, the statute does authorize an appeal (Code, § 427), does not confer jurisdiction to review the ruling on the motion to strike. Such ruling may be reviewed only when assigned as error on appeal taken from the final decree in the cause.

The decree of the chancellor overruling the demurrer to the bill as amended will be reversed, and a decree here rendered sustaining the demurrer.

Reversed and rendered.

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Statutory Action in the Nature of Ejectment.

1. *Ejectment; when adverse possession shown.*—In an action of ejectment, where the plaintiffs claim title as heirs at law of their deceased father, and the defendant who was also a son of the deceased claimed title by adverse possession, and it is shown without conflict that during the period of defendant's occupation of the land down to the death of the father, the father lived on the land with the defendant and his family, that the defendant gave in the lands for taxes in the name of

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his father, and by other unequivocal acts recognized the latter's title to the land, and the evidence further shows that the defendant entered into possession by permission of the father and not in hostility to him, the law in such case refers the possession to the title, and the defendant is shown not to have been in adverse possession; and under such evidence the plaintiffs will be entitled to recover.

2. *Same; adverse possession; when declarations by defendant not admissible in evidence.*—In an action of ejectment, where the plaintiffs claim title as heirs at law of their deceased father, and the defendant who was also a son of the deceased claims title by adverse possession, and it is shown that during the period of the defendant's occupation of the land down to the death of the father, the latter also lived on the land with the defendant and his family, and by unequivocal acts throughout that period recognized the title of his father to the lands, and that his possession was acquired by permission of the father, declarations of the defendant to a third person that he claimed the land as his own, are of no consequence, and are immaterial and inadmissible in evidence.
3. *Same; same; inadmissible evidence.*—In such a case, the declarations of the father and the fact that he had given the land to the defendant and that he had put the defendant in possession are inadmissible in evidence.
4. *Ejectment by tenants in common; proper judgment therein.*—In an action of ejectment, where the plaintiffs and defendants are tenants in common, and the plaintiffs claim an undivided interest in said lands, upon a verdict returned in favor of the plaintiffs, a judgment in their favor declaring that they recover of the defendant the undivided interest sued for in the complaint is proper, and in such case it is not material whether all of the tenants in common are joined in the action.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. A. H. ALSTON.

This was a statutory action of ejectment brought by the appellees against the appellant, to recover the possession of an undivided three-fourths interest in certain lands specifically described in the complaint.

The cause was tried upon the plea of the general issue. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

There was verdict for the plaintiffs, and judgment was

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rendered in favor of the plaintiffs, declaring that they were entitled to the undivided three-fourths interest in the lands described in the complaint. From this judgment the defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

B. B. & W. H. BRIDGES and OLIVER & OVERTON, for appellant.—Judgment can be recovered by the plaintiff only to the extent of his interest in the demanded premises according to his right and title therein as proven.—6 Am. & Eng. Ency. Law (1st ed.), 245; *Nye v. Lovitt*, 24 S. E. Rep. 345.

Declarations of a person who is in possession of property made in good faith, explanatory of his possession, are competent and admissible as part of the *res gestae*, whenever the fact of possession itself is pertinent to the issue, no matter who may be the parties to the litigation.—*Humes v. O'Bryan & Washington*, 74 Ala. 64; *Dothard v. Denson*, 72 Ala. 541; *Kirkland v. Trott*, 66 Ala. 417; 1 Greenleaf on Evidence, § 109; *Fontaine v. Beers*, 19 Ala. 722; *Bliss v. Winston*, 1 Ala. 344.

Declarations or entries made by a person since deceased, against his interest at the time, are admissible against a third person whose right may be affected. *Hart v. Kendall*, 82 Ala. 144; *Humes v. O'Bryan & Washington*, *supra*; *Beasley v. Clark*, 14 So. Rep. 744; *Beasley v. Howell*, 117 Ala. 499; 1 Greenleaf on Evidence, *supra*; *Fontaine v. Beers*, *supra*; *Bliss v. Winston*, *supra*; *Pittman v. Pittman*, 124 Ala. 306; *Wisdom v. Reeves*, 110 Ala. 418.

The fact of adverse possession cannot be proven by reputation.—*Woods v. Montevallo C. & T. Co.*, 84 Ala. 569; *Humes v. O'Bryan & Washington*, *supra*; *Benje v. Creagh's Admr.*, 21 Ala. 151.

SAMUEL HENDERSON, *contra*, cited Sedgwick & Wait on Trial of Title to Land (2d ed.), § 733; Newell on Ejectment, 723, § 33; *Jones v. Pelham*, 84 Ala. 208.

McCLELLAN, C. J.—This statutory action in the nature of ejectment is prosecuted by Clark Butler and

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others, sons and daughters of W. H. Butler, deceased, against Daniel Butler, also a son of said W. H. Butler. Plaintiffs derive their title as heirs at law of their father. Defendant, conceding the original title of the father, claims that the title is now vested in him by adverse possession. It is shown without conflict that during all the period of defendant's occupation of the land down to the death of W. H. Butler in January, 1899, the latter was also living on the land, he and defendant and defendant's family living together thereon. The law in such cases refers the possession to the title, and, hence, *prima facie* the possession throughout that period was in W. H. Butler, and defendant had no possession adverse to him. It is shown, also without conflict, that, so far from claiming adversely to his father, Daniel Butler by unequivocal acts, such as giving the land in for taxes in the name of his father, throughout that period recognized the title of W. H. Butler in and to the premises. Nor is there any room for controversy on the evidence adduced or offered that Daniel entered not in hostility to but by permission of W. H. Butler. And if he ever at any time brought home to his father a knowledge of a disavowal of the servient and permissive character of his occupation, there is no hint of it in the evidence introduced on the trial. In the absence of such evidence the fact that the defendant declared to third persons that he claimed the land as his own was of no consequence, and evidence of it was properly excluded from the jury.—*Jones v. Pelham*, 84 Ala. 208.

Nor did the court err in excluding the proposed evidence as to declarations of W. H. Butler to the effect that he had given the land to Daniel, the defendant. Of course, these declarations were not competent, and they were not offered to show a conveyance to Daniel. Their sole office in the case would have been to show that Daniel, and not W. H., held the possession of the premises, and that the possession of the former was adverse to the latter. Considered as showing this, they also necessarily showed their own incompetency, since with the declarant out of possession there was no predicate

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for his declarations, they were not within the doctrine of *res gestae*, or any exception to the rule against hearsay.

As to the further declarations of W. H. Butler to the effect that he had put Daniel in possession, it need only to be said that their tendency was to prove what was not controverted in the case and what was of detriment rather than advantage to the defendant, to-wit, that Daniel entered and held possession by permission of his father.

On the considerations adverted to first above with the evidence as it was before the jury, the plaintiffs were entitled to the affirmative charge which the court gave; and they would have been none the less so entitled had the testimony of Whit Butler that he "never knew it to be anybody's lands but W. H. Butler's" and of T. J. Lovvorn that he "never heard of anybody claiming the land but W. H. Butler," been excluded. Hence we need not inquire whether the court's rulings in respect of said testimony were correct or not.

Plaintiffs and defendant being tenants in common in the land as heirs at law of W. H. Butler, deceased, the effect of the judgment for plaintiffs is to let them into possession with the defendant. As each one of the dispossessed tenants is entitled to be thus let in, it is not material whether all of them have joined in this action.

Affirmed.

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Bill in Equity for a Divorce.

1. *Bill for a divorce; equity pleading; orders of chancellor for taking further testimony after submission of cause.*—On a bill filed by a husband against his wife for a divorce upon the ground of voluntary abandonment, a decree *pro confesso* was rendered. The cause was then submitted by complainant for decree in vacation upon testimony taken by him. After the

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submission, the chancellor, for the purpose of informing himself as to whether there existed a defense to the bill, prepared interrogatories to be propounded to the defendant, which he directed the register to have answered. The register obeyed these instructions, but the complainant had no knowledge or notice of the time and place of taking the answers, nor was he given an opportunity to file cross interrogatories, to cross examine the defendant as a witness. *Held*: That in such a proceeding the complainant was denied a right to which he was entitled, and that the answers of the respondent to the interrogatories so propounded should not have been considered by the chancellor as evidence, and that, therefore, a decree, based upon such answer denying to complainant the divorce as prayed for, was erroneous.

APPEAL from the Chancery Court of Tallapoosa.
Heard before the Hon. RICHARD B. KELLY.

The bill in this case was filed by the appellant, W. H. Wilkinson, against the appellee, Mary W. Wilkinson; and prayed for a divorce from the defendant upon the ground of voluntary abandonment of the complainant. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

On the final submission of the cause the chancellor rendered a decree denying the relief prayed for and ordering the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

JAMES W. STROTHER, for appellant.

No counsel marked as appearing for appellee.

TYSON, J.—The bill in this cause was filed by the husband against the wife for a divorce upon the ground of voluntary abandonment. It contains all the necessary statutory allegations.—Code, §§ 1485, 1492.

After decree *pro confesso* the complainant, in accordance with the provisions of the act of the General Assembly approved December 14, 1898, (Acts, 1898-99, p. 118), submitted his cause for decree in vacation, upon the

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testimony taken by him. After the submission, the chancellor, for the purpose of informing himself as to whether there existed a defense to the bill, prepared interrogatories to be propounded to the defendant, which he directed the register to have answered. This the register did, and those answers were considered by him upon the hearing as evidence in the cause. It does not appear that the complainant knew that this order had been made in the cause, or ever saw the interrogatories. Nor does it appear that he had any notice of the time and place of the taking the answers upon the interrogatories by the register, or was given an opportunity to file cross-interrogatories, or to cross-examine the witness. For aught appearing, the whole proceeding was *ex parte*. Indeed, from all that appears in the record, it may be affirmed that it was an *ex parte* deposition.

While it is true, that such suits are regarded as of a tripartite character—a triangular proceeding *sui generis*—wherein the public, or government, occupies in effect the position of a third party, and the court is bound to act for the public in such cases (*Powell v. Powell*, 80 Ala. 595; *Ribet v. Ribet*, 39 Ala. 348), and may to that end, *ex mero motu*, at any time before final decree, direct an inquiry to ascertain the fact of the existence of a defense (*Smith v. Smith*, 4 Paige, 432; 7 Ency. Pl. & Pr., 88), we apprehend, in making the inquiry, the rights of the complainant are not to be abridged or disregarded, but must be respected. When an inquiry of this sort is instituted by the chancellor, involving as it necessarily does the right of the complainant to maintain his suit, there is no reason why the complainant should be precluded or debarred of the rights which he has, of having notice of the inquiry as well as the right to cross-examine the witnesses who may be examined by the court and to introduce evidence in his own behalf. The fact that the issue is made with him by the court instead of by the respondent, does not and cannot deprive him of his right of trial according to the forms of law, the right to know the issue he is expected to meet, to cross-examine the witnesses who may be called to testify against him upon the issue, and

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to introduce evidence to disprove the truth of the defense attempted to be set up by the court to defeat his bill. No good reason can be assigned, and for that matter none can exist, why the government should be accorded an advantage in this class of cases which it does not and cannot have in causes where the State, its representative, is a party on the record. In whatever form the inquiry may be instituted, it is safe to say the complainant is entitled to be heard. To deprive him of this right would be to deny to him due process of law. It follows that the answers of the respondent to the interrogatories cannot be considered as evidence.

Reversed and remanded.

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Action by Employee against Railroad Company to recover Damages for Personal Injuries.

1. *Bill of exceptions; when stricken from the file on appeal.*—Where a bill of exceptions, copied in the transcript in a case on appeal contains a verbatim report of the examination of all the witnesses, and further contains much that transpired during the trial, such as remarks of the judge and of counsel, questions not answered and rulings not excepted to, which was wholly unnecessary to be considered by the appellate court in passing on the questions presented for review, there is such a flagrant violation of the rule of practice regarding the preparation of bill of exceptions, (Code, p. 1201, Rule 33), that such bill of exceptions will, upon proper motion made, be stricken from the transcript.
2. *Action against railroad company for negligence; sufficiency of complaint.*—In an action against a railroad company by an employe to recover damages for personal injuries sustained while the plaintiff was in the employ of the defendant, a complaint which avers that at the time of receiving the injuries sustained the plaintiff was in the discharge of his duties as conductor of a switch engine, and while assisting in getting out cars from the yard of the defendant, then avers that after

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said cars had been coupled up, he gave a signal to the engineer to pull out, and then "got on a ladder on the end of one of the cars at or near the rear end of said train of cars, preparatory to riding to another part of the yard of the defendant, as it was his duty to do to discharge his duties as such conductor, * * * whereupon said engineer [naming him] negligently did something unknown to plaintiff, but known to such person, which caused said car, upon which plaintiff was holding to by the ladder thereon, to give a violent and sudden jerk or lurch which caused plaintiff to be jerked or thrown off of said car and ladder and under said train of cars, whereby he was injured," sufficiently states a cause of action.

3. *Same; contributory negligence; sufficiency of plea.*—In an action against a railroad company by an employe to recover damages for personal injuries, a plea which avers that "the plaintiff's own negligence proximately contributed to the injuries complained of," is too general and subject to demurrer. A plea of contributory negligence should aver facts constituting the contributory negligence interposed as a defense.
4. *Pleading and practice; pleading over after demurrer sustained; error without injury.*—Where it appears that the defendant, after demurrers were sustained to his original plea, had, under an amended plea, the benefit of all defenses he was entitled to make under the original plea, the rulings of the court in sustaining the demurrer to the original plea, if erroneous, is error without injury.

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon. JOHN PELHAM.

This was an action brought by the appellee, J. M. Jackson, against the Southern Railway Company, to recover damages for personal injuries.

The complaint as amended contained six counts. Each of the counts of the complaints averred that the plaintiff was in the employment of the defendant and at the time of receiving the injuries complained of was in the discharge of his duties as conductor of a switch engine which was being operated in the defendant's yard; that the "injuries were caused by reason of the negligence of Luke Austin, a person who was in the service or employment of the defendant as engineer, and who had charge or control of the switch engine of de-

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fendant in the yards of the defendant." The specifications of negligence in the counts of the complaint were as follows: "Plaintiff, while conductor of said switch engine, and in the discharge of his duties as such conductor, was assisting in getting out local cars, and after said train of cars had been coupled up he gave the signal to pull out (*and he then got on a ladder on the end of one of the cars at or near the rear end of said train of cars*) preparatory to riding to another part of the yards of defendant as it was his duty to do to discharge his duties as such conductor of said switch engine at that place, whereupon said (Luke Austin, the) engineer negligently did something unknown to plaintiff, but known to such person, which caused said car upon which plaintiff was holding to by the ladder thereon, to give a violent and sudden jerk or lurch, which caused plaintiff to be jerked or thrown off of said car and ladder and under the said train of cars, whereby he was injured as aforesaid by having his right leg cut off below the knee and his left leg run over, injuring, disabling, and maiming him for life, as aforesaid." The plaintiff sued for \$50,000 damages.

The defendant filed the plea of the general issue and in addition to several other special pleas setting up the contributory negligence on the part of the plaintiff, the defendant filed the following special pleas (the portions of the pleas in parentheses being added by amendment): "Second. For further answer to the complaint as amended and separately to each count thereof the defendant says that the plaintiff's own negligence proximately contributed to the injuries complained of."

"Seventh. For further answer to the complaint as amended and separately to each count thereof, defendant says that the plaintiff's own negligence contributed proximately to the injuries complained of, in this, that the plaintiff carelessly and negligently undertook to board a car on a moving train by putting only one hand and foot on the ladder of the car, and doing so from the platform of a depot near by, which was hazardous and dangerous method of boarding said train. (And de-

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fendant avers that in negligently assuming such dangerous and hazardous position, plaintiff thereby contributed proximately to the injuries mentioned in the complaint.)

"Eighth. For further answer to the complaint as amended and separately to each count thereof, the defendant says that the plaintiff's own negligence proximately contributed to the injuries complained of, in this, that at the time said injuries were received the plaintiff was foreman in charge of defendant's train mentioned in the complaint, and signalled the engineer to start said train, and after boarding the same, and while said train was in motion, was standing between two cars thereof, holding with the left hand a rung of the ladder constructed and designed to enable employees to mount to the top of the cars, with the right hand pressed against one of said cars of said train, which said position was dangerous and hazardous and rendered him liable by any shock or jerk in the operation of the train to be thrown between the cars and injured; (and defendant avers that such dangerous and hazardous position so assumed by the plaintiff did proximately contribute to cause said injuries; and defendant avers that the plaintiff thereby, by his own negligence, proximately contributed to the injuries mentioned in the complaint.)"

To the second plea the plaintiff demurred upon the ground that the act constituting the plaintiff's negligence was not sufficiently set forth. To the seventh and eighth pleas, as originally filed, the plaintiff demurred upon the following grounds: 1. That it was not shown that what the plaintiff did as mentioned in said pleas was the proximate cause of his injuries. 2. It is not averred that the plaintiff's injuries resulted from the doing what he alleged in said pleas to have done. The demurrers to the second, seventh and eighth pleas, as originally filed, were sustained. Thereupon the defendant amended the seventh and eighth pleas by the addition of the portion thereof included in the parentheses. The plaintiff refiled the same demurrers to the seventh and eighth pleas, as amended, and these demurrers were overruled.

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On the present appeal it is unnecessary to set out in detail the facts of the case.

There were verdict and judgment for the plaintiff, assessing his damages at \$3,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

In this court a motion was made by the plaintiff to strike the bill of exceptions from the file on the ground that it was in violation of Rule 33 of the Circuit Court Practice, and was not prepared as was required by the rulings of this court.

KNOX, BOWIE & BLACKMON, for appellant.

HOKE SMITH, J. J. WILLETT and H. C. PEEPLES, *contra*, cited *H. & A. B. R. R. Co. v. Miller*, 120 Ala. 535; *Railroad Co. v. Wilmer*, 97 Ala. 168.

SHARPE, J.—Following precedents set in *Gassenheimer v. Marietta Paper Co.*, 127 Ala. 183, and *L. & N. R. R. Co. v. Hall*, 131 Ala. 161, the motion to strike the bill of exceptions from the record of this cause will be granted. The bill violates rule 33 of circuit court practice, in that it contains much of what is in substance repetition of testimony besides much that is not testimony such as remarks of the judge and of counsel, questions not answered and rulings not excepted to and which are wholly unnecessary to be considered in passing on the questions presented for review. It seems to contain a verbatim report of the examination of all the witnesses so that about seventy typewritten pages of the transcript are employed to present a case wherein the facts are comparatively few.

In the assignments of error which are based on the record proper there is nothing to warrant a reversal of the judgment. After the amendments allowed, each count of the complaint which was demurred to averred with sufficient particularity facts showing a cause of action under subdivision 5 of section 1749 of the Code. See *Highland, etc., Co. v. Miller*, 120 Ala. 538.

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Plea 2 is bad for generality.—*L. & N. R. R. Co. v. Markee*, 103 Ala. 160.

By pleas 7 and 8 as amended defendant was given the benefit of all defenses it was entitled to make under those pleas as they stood before the amendment, and, therefore, it was not prejudiced by the judgment sustaining demurrers to the pleas as originally filed. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284.

Affirmed.

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Bill in Equity for Statutory Redemption.

1. *Statutory right of redemption; sufficiency of tender.*—One of the conditions precedent to the exercise of the statutory right of redemption from a sale under a mortgage, is the payment or tender to the purchaser by the mortgagor of the purchase money with ten *per centum* thereon and all lawful charges (Code, § 3507); and the fact that the purchaser at the foreclosure sale has within the time allowed for redemption sold a part of the land so purchased by him and received payment therefor, does not excuse the redemptioner from paying the full amount of the purchase money with ten *per cent.* and all other lawful charges, in order to entitle him to exercise the statutory right.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. WILLIAM L. PARKS.

The bill in this case was filed by Michael Burke against Willis Brewer, for the purpose of enforcing the statutory right of redemption. The facts of the case are sufficiently stated in the opinion.

After averring in his bill that he had tendered the defendant \$5,500, the bill contained the recital that the complainant paid into the registry of said court \$5,500. There was also an offer on the part of the complainant to do equity.

The prayer of the bill was that the complainant be permitted to redeem the lands described in the bill

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from the defendant; that there be a reference to the register to ascertain what amount was necessary to be paid in order to effect such redemption, etc.

On the final submission of the cause, the chancellor rendered a decree denying the relief prayed for and ordering the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

W. C. OATES, E. F. JONES, GORDON MACDONALD and JOHN D. MCNEEL, for appellant, cited Code, § 3505; *Dexter v. Arnold*, 1 Sumn. 118; *Downs v. Hopkins*, 65 Ala. 588; *Cramer v. Watson*, 73 Ala. 127; *Otis v. McMillan*, 70 Ala. 46; *Scale v. Phieffer*, 77 Ala. 278; *Stinson v. Pepper*, 47 Fed. Rep. 676; *Montgomery v. Miller*, 131 Mo. 595.

POWELL & MIDDLETON, *contra*, cited Code, § 3507; *Beebe v. Buxton*, 99 Ala. 117; *Cramer v. Watson*, 73 Ala. 127; *Caldwell v. Smith*, 77 Ala. 137.

DOWDELL, J.—The bill filed in this cause is essentially for the enforcement of a statutory right of redemption. It possesses not a single element necessary to the assertion by the mortgagor of any right he may claim to have had to enforce his equity of redemption. The regularity of the sales under the respective mortgages is not in anywise assailed. On the contrary, the validity of those sales are fully recognized. Being a bill pure and simple to enforce an alleged statutory right of redemption, one of the essential prerequisites to its maintenance is the payment or tender by the complainant to the respondent, within two years after the sales under the mortgages, of the purchase money with ten *per centum* thereon and all other lawful charges.—Code, § 3507, and authorities cited under it. We do not understand this proposition to be controverted, but the fact in dispute between the parties arises over the amount that should have been tendered. Stating the complainant's contention most strongly, it is, that the amount due to respondent was thirty-

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six hundred dollars on the sales under the Tulane mortgages and twenty-seven hundred and forty-five dollars on the sale under the Tyson mortgage, aggregating the sum of sixty-three hundred and forty-five dollars. The testimony is in hopeless and irreconcilable conflict on this point. And we shall not undertake to determine who has the right of it, as it is unnecessary under the view we take of the case. The complainant did not tender the sixty-three hundred and forty-five dollars, which he admits, both in his bill and testimony, was the amount of the purchase money which was a charge upon the land sought to be redeemed. He predicates his contention for declining to do so, upon a credit claimed by him of sixteen hundred dollars arising from a sale of the "Kendrick place," made by the respondent after he became the owner of the lands, the redemption of which is not sought by the bill; and tendered only the balance of the purchase money after deducting this credit. To a better understanding of the question as to his right to this credit, it will be well to state, in short, some of the facts. The complainant, being the owner of two separate tracts of land, one known as the "Hale place" and the other as the "Kendrick place," executed to one Tulane two mortgages,—one of these conveying the "Hale place" and the other both places. He also executed to one Tyson a mortgage upon both places. These mortgages were foreclosed in January and February, 1896, and both tracts purchased by the respondent's vendors, from whom, shortly afterwards, on to-wit, February 12th, he acquired the title thereto. In March following, the respondent sold and conveyed to one Whitten upon a consideration of sixteen hundred dollars, the "Kendrick place." On the 26th day of September, 1896, the complainant tendered to the respondent fifty-five hundred dollars, being the balance claimed by complainant to be due him as purchase money and ten *per centum* thereon, after deducting the sixteen hundred dollars, which the respondent had received from Whitten. This bill was filed on the 14th of September, 1899, and seeks only a redemption of the "Hale place," keeping good

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the tender of the fifty-five hundred dollars by paying it to the register of the court.

The only theory upon which it is possible to sustain the complainant's right to the credit claimed, is, that the "Kendrick place" belonged to him and not to the respondent, at the date of its sale to Whitten or at the date of the tender. For if he had been deprived of his property rights in and to it by the foreclosure sale, the regularity of which is not questioned, the money paid by Whitten to respondent was not his and never could be.

It has been uniformly held by this court that the right of redemption under the statute is purely the creature of legislation and has no existence without it. It is merely a personal privilege conferred upon the mortgagor and is neither property, nor the right of property—not subject to levy and sale under execution, and prior to the amendment of the statute not assignable. *Powers v. Andrews*, 84 Ala. 291; *Parmer v. Parmer*, 74 Ala. 285; *Otis v. McMillan*, 70 Ala. 61, 62; *Newburn's Heirs v. Bass*, 82 Ala. 622; *Lehman v. Moore*, 93 Ala. 186; *Aiken v. Bridgeford*, 84 Ala. 295; *Commercial Real Estate Asso. v. Parker*, *Ib.* 298. It can never come into existence until after the equity of redemption of the mortgagor, the last vestige of his right in the property conveyed by the mortgage, has been cut off by foreclosure.—*Powers v. Andrews*, *supra*. And when the equity of redemption has been lost to him, he has nothing left but the personal privilege conferred by the statute, which must, in order to rehabilitate himself with the title to or any interest whatever in the lands, be conformed to. In other words, he is bound to perform every condition imposed by the statute in order to re-acquire the title. Failing in this, his right to redeem is not perfected, and the purchaser, from whom the redemption is sought, is the absolute owner. *Spoor v. Phillips*, 27 Ala. 197; *Otis v. McMillan*, *supra*.

To repeat, one of the essential conditions to the exercise of this right is the payment or tender of the whole of the purchase money with ten *per centum* thereon and all other lawful charges.—*Beebe v. Bur-*

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ton, 99 Ala. 188, and cases there cited; *Cramer v. Watson*, 73 Ala. 127. And until a sufficient tender is made, the mortgagor has no right of property in the lands. This being true, the "Kendrick place" belonged absolutely to the respondent or rather to his vendee Whitten when the tender was made and the sixteen hundred dollars belonged to the respondent, and not to complainant. He was, therefore, not entitled to have a credit for it on the purchase money which he was bound to tender, in order to reinvest himself with the title to the land sought to be redeemed.—*Richardson v. Dunn*, 79 Ala. 170.

Affirmed.

Tyson, J., not sitting.

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Contest of Exemption.

1. *Judgment for statutory penalty; no exemptions allowed against it.*—As against a judgment rendered in a suit brought for the recovery of the statutory penalty for cutting trees upon the lands of another, (Code, § 4137), there is no constitutional or statutory exemptions allowed in this State; such action being an action *ex delicto* for a tort.
2. *Exemption; not allowed against costs in an action of tort.*—If in an action of tort, the plaintiff fails in the suit and judgment for costs is rendered against him in favor of the defendant, he can not claim his exemptions as against such judgment.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. J. A. BILBEO.

George P. Slaton, the appellee, brought an action against the appellant, John C. Crawford, to recover the statutory penalty for cutting trees upon his lands.

On the trial of this suit the plaintiff was cast and judgment was rendered in favor of the defendant for costs. Upon this judgment the said Crawford sued out a writ of garnishment which was served upon one

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Street. Upon its being shown that Street, the garnishee, was indebted to Slaton, Slaton filed his claim of exemptions and included therein said debt of Street to him. The plaintiff in the garnishment, said J. C. Crawford, interposed a contest to the claim of exemptions, and moved the court to strike from the file the claim as interposed upon the ground, among others, that the judgment which was the foundation of the present suit was in an action of tort. This motion was overruled, and the plaintiff duly excepted.

On the trial of the contest of exemptions, the court without a jury rendered judgment in favor of the defendant, and held that his claim of exemptions to the fund in the hands of the garnishee should be allowed. To the rendition of this judgment the plaintiff duly excepted. The plaintiff appeals, and assigns as error the ruling of the court in refusing to strike the claim of exemptions from the file, and in rendering judgment in favor of the defendant on the claim of exemption.

STREET & ISBELL, for appellants, cited 12 Am. & Eng. Ency. Law (2d ed.), 172; *Williams v. Borden*, 69 Ala. 433; *Stucky v. McKibbin*, 92 Ala. 622; *Penton v. Diamond*, 92 Ala. 610; *Dangair v. Lunsford*, 112 Ala. 403; *Nothorn v. Hanners*, 121 Ala. 587; *Willis v. Byrne*, 106 Ala. 425; 16 Ency. Pl. & Pr., "penal actions."

No counsel marked as appearing for appellee.

McCLELLAN, C. J.—An action for penalties prescribed for a wrongful act or omission, though technically an action of debt, is not an action for the recovery of a debt contracted, but an action *ex delicto* for a tort.—*Williams v. Borden*, 69 Ala. 433. The action brought by Slaton against Crawford for the penalties prescribed by section 4137 of the Code was of this sort. And against the judgment in such action whether for costs and damages for the plaintiff or for costs in favor of the defendant there is no exemption from levy and sale.—*Northern v. Hanners*, 121 Ala. 587. The circuit court erred in its rulings to the contrary. Its judgment will be reversed and the cause will be remanded.

Reversed and remanded.

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Proceedings for Probate of Will.

1. *Probate of will; admissibility in evidence of circumstances attending execution of the will.*—In the contest of the probate of a will, where each of the attesting witnesses are dead, and the principal issue is as to whether or not the will was duly executed, and the genuineness of the signatures of each of the attesting witnesses has been shown, it is competent for a witness who was staying with the testatrix and who had seen the will and recognized the signature of the testatrix immediately after its execution, to testify to the circumstances attendant upon the execution of said will, such as the reasons why the will was made, the going to the room of the testatrix of the lawyer and attesting witnesses for the purpose of its execution; and this is true, although such witness was not in the room at the time of the writing of the will, or when it was signed by any one, and, therefore, did not see its execution.
2. *Same; when evidence relating to revocation inadmissible.*—On the contest of the probate of a will, where one of the grounds of contest was that the will had been revoked and the proponent had shown *prima facie* its due execution, declarations of the testatrix that the instrument offered for probate was not her will, and the fact that after its execution she had sold or offered to sell certain property disposed of by said will, or that there had been a change in the testatrix' church relations, or that the estrangement between the testatrix and the contestant's father had been adjusted before her death, are immaterial and constitute no evidence of a revocation and, therefore, incompetent as evidence.
3. *Contest of will; when general affirmative charge given as to grounds of contest.*—Where the probate of a will is contested upon several grounds, and there is an entire absence of evidence to support the same by the grounds of contest, it is proper for the court at the request of the proponent to give the general affirmative charge in favor of the proponent as to the grounds which were not supported by any evidence.
4. *Same; charge to the jury.*—On the contest of the probate of a will, a charge is erroneous and properly refused which instructs the jury that if they "find from the evidence that it

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is as reasonable to infer that the alleged attesting witnesses to the paper offered in evidence as the last will of W., deceased, subscribed their names thereto out of her presence, as that any two of them subscribed their names in her presence, then they may find in favor of the contestant."

APPEAL from the Probate Court of Limestone.

Heard before the Hon. JAMES E. HORTON.

The appellee in this case, John Hundley, filed his application in the probate court of Limestone county asking that the paper presented for probate with said petition be probated as the last will and testament of Miss Mary Ann Walton, averring that he was named in said will as executor. The appellant, James W. Woodroof, one of the next of kin of said Mary Ann Walton, filed his contest for the probate of said will and assigned the following grounds therefor: "1. That the instrument in writing propounded by John Hundley as the last will and testament of said Mary Ann Walton, deceased, was not duly executed as her last will and testament. 2. That said instrument in writing was revoked by the said Mary Ann Walton, deceased, by another instrument in writing subsequently executed in the presence of witnesses as required by law by said Mary A. Walton, deceased, as and for her last will and testament. 3. That said instrument was procured by fraud and undue influence exerted upon said Mary A. Walton, deceased. 4. That said instrument was revoked by said Mary A. Walton by another instrument in writing subsequently executed by said Mary A. Walton in the presence of witnesses as required by law. 5. That at the date of said instrument in writing said Mary A. Walton's physical and mental condition was such as to render her incapable of executing a valid last will and testament. 6. That said instrument in writing was revoked by said Mary A. Walton by tearing the same apart with the intention of revoking it." Each of the witnesses whose names were affixed to said will as attesting witnesses were sworn to be dead. The proponent proved the death of the testatrix, the genuineness of her signature attached to said will, the death of the three witnesses whose names

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appeared as attesting witnesses, and the genuineness of their signatures, and also introduced evidence tending to show that the will offered for probate was executed by the testatrix in Nashville, Tennessee, just before she was going to undergo a serious operation, and that it was prepared for her by an attorney in Nashville, her idea being, as stated, that not knowing whether or not she would survive the operation, she wished to have her property disposed of as she desired. This will was executed on the 11th of September, 1876.

Mrs. Fannie M. Hundley, a witness for the proponent, testified that she had known the testatrix since 1854; that she was a legatee and devisee under the will; that she accompanied the testatrix to Nashville when she went for the purpose of having the operation performed. She then testified to having occupied the same room with the testatrix and was in said room when the attorney and the witnesses whose names were signed as attesting witnesses came to the room for the purpose of having the will executed; that a few minutes after these persons entered she retired from the room and was absent for an hour or more; that as she was returning to the room she met said persons coming from the room of Miss Walton; that when she entered the room she saw a table near Miss Walton's bed and lying on said table she saw the will which is sought to be probated; that the last page of said will was exposed, and she saw the signature of Miss Walton affixed thereto, and also that of the attesting witnesses; but she was not present when said will was signed and when the witnesses whose names were signed thereto signed it.

The contestant separately objected to each portion of this witness' testimony, as stated above, upon the ground that she was not in the room at the time of the writing of the will, or when it was signed by the testatrix, or either of the attesting witnesses. The court overruled each of such objections, and to each of these rulings the contestant separately excepted.

The contestant sought to introduce in evidence certain statements made by the testatrix, to the effect that the will which she had executed in Nashville was not

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her will, and also that before her death she had conveyed certain property or had offered to sell other property which was disposed of in said will; that certain of the beneficiaries named in the will were not kin to her, while the testatrix was a half sister of the contestant's father, and also that the estrangement which had existed between the testatrix and the contestant's father had been adjusted and passed over some time before her death, and also that there had been a change in the church relations of the testatrix. To each portion of this testimony as offered by the contestant the proponent separately objected. The court sustained each of such objections, refused to allow the introduction of such testimony, and to each of such rulings the contestant separately excepted.

The evidence as to the revocation of the will of the testatrix was substantially the same as was shown on the former appeal in this case, and special reference is here made to the facts pertaining thereto as found in said report in 127 Ala. 642.

The court, at the request of the proponent, gave to the jury the following written charges, to the giving of each of which the contestant separately excepted: (2.) "I charge you, gentlemen of the jury, that there is no evidence before you to support the second ground of contest." (3.) "I charge you, gentlemen of the jury, that there is no evidence before you to support the fourth ground of contest." (4.) "I charge you, gentlemen of the jury, that there is no evidence before you to support the fifth ground of contest." (5.) "I charge you, gentlemen of the jury, that there is no evidence before you to support the sixth ground of contest."

Among the many charges requested by the contestant, and to the refusal to give each of which the contestant separately excepted, was the following: (13.) "If the jury find from the evidence that it is as reasonable to infer that the alleged attesting witnesses to the paper offered in evidence as the last will of Mary Ann Walton, deceased, subscribed their names thereto out of her presence, as that any two of them subscribed

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their names in her presence, then they may find in favor of the contestant."

There were verdict and judgment in favor of the proponent, and the will was ordered to be admitted to probate as the last will and testament of Mary Ann Walton. The contestant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

R. W. WALKER, MILTON HUMES and W. T. SANDERS, for appellant.—In the case of the death or absence of the attesting witnesses, an attestation clause is *prima facie* evidence that the will was executed with the formalities therein recited, and that if there is no attestation clause, due execution of the will must be proved in some other way to entitle the paper to admission to probate.—29 Am. & Eng. Ency. Law, 199; 6 Lawson's R. R. & P., §§ 3199, 3200; 32 Am. Rep. 650; 25 N. Y. 429, note, and the rule repeatedly stated by the authorities, that, "in no case will the presumption of compliance with the statutory formalities recited arise unless the will appears upon its face to have been duly executed.—29 Am. & Eng. Ency. Law, 202; Schouler on Wills (2d ed.), § 347; 1 Jar. on Wills (5th ed.), § 86; Same (6th ed.), § 92, pp. 123, 124; 1 Red. on Wills (4th ed.), 234.

The provision for secondary evidence made by section 4276 of the Code is manifestly based upon the assumption that the primary evidence was available when the paper was executed and has only been rendered unavailable by subsequent events. Secondary evidence is admitted in consequence of a change of conditions rendering unavailable the primary evidence which could have been produced but for such change of conditions. It is the subsequent death, insanity, or incompetency of the witnesses which authorizes proof of their handwriting. The expression "absence from the State" found in such connection must be construed as referring to the absence from the State of one who was present in the State when the paper was signed. In other words, the assumption underlying this provision for secondary evidence is that the paper was signed in this State. The pro-

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vision has reference to wills made in this State, not to wills made elsewhere. There is nothing to indicate that the provision had reference any more to wills made in other States of the Union than to wills made in any foreign country. It is not to be supposed that the provision was intended to apply to wills made in any part of the world. Unless this supposition can be indulged, the operation of the provision for secondary evidence must be restricted to wills made in this State. The result is that wills made out of the State must be proved in the manner required before the enactment of this statute. That proof must be evidence showing a compliance with the requirements of the Alabama law. No such proof was adduced in this case. In the absence of such proof, the predicate for the admission of said paper as Miss Walton's will was not established, and the court should have given the affirmative charge in favor of the contestant.—Code, §§ 4263, 4276; *In re Thomas' Will*, 111 N. C. 409, 16 S. E. Rep. 226; *University v. Blount*, Term Rep. 13 (N. Co.); *Blount v. Patton*, 2 Hawk. 241; *Harvin v. Spring*, 10 Ired. 181; *Estate of Bogart*, 6 Civil Proc. 128; *Mutter of Cottrell*, 5 Civil Proc. 340; *Barnewall v. Murrell*, 108 Ala. 367.

But as the whole question turns at last on the ascertainment of the testator's intention, the testator's declarations, both contemporaneous with, and subsequent to, the act, must be admissible in evidence to explain it; for an act may often amount to a revocation, when declared by the testator to be so intended, which standing alone would not justify a like inference.—1 Jarman on Wills (5th ed.) (Bigelow) 183 note (b); 1 Greenleaf on Ev. (14th ed.), § 273; *Weeks v. McBeth*, 14 Ala. 474; Schouler on Wills, § 431. "Usually the intention with which the act of spoliation or obliteration is done is for the determination of the jury, especially if it be of an equivocal nature."—29 Am. & Eng. Ency. Law, 326.

THOS. C. MCCLELLAN and OSCAR HUNDLEY, *contra*, cited *Woodroof v. Hundley*, 127 Ala. 640; *Barnewall v. Murrell*, 108 Ala. 366; 19 Am. & Eng. Ency. Law (1st ed.), note, p. 1077.

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TYSON, J.—There was but one issue of fact for the determination of the jury, on the trial of the case, notwithstanding there were numerous grounds of contest interposed. That issue was, whether the evidence offered by the proponent was sufficient to authorize the jury to find that the will was duly executed. Confessedly if the will was properly admitted in evidence, the jury had the right to so find. So then, preliminary to the introduction of the will in evidence, it was incumbent upon the proponent to show *prima facie* its due execution. This he did, when he made proof of the death of the testatrix, the genuineness of her signature, the death of the three persons whose names appear as attesting witnesses and the genuineness of their signatures, when coupled with the circumstances testified to by Mrs. Hundley.—*Woodroof v. Hundley*, 127 Ala. 640.

But it is insisted that Mrs. Hundley's testimony was irrelevant and should not have been admitted. This insistence seems to be predicated upon the theory that she was not in the room at the time of the writing of the will, or when it was signed by anyone. In other words, she did not see its execution. We do not understand the rule to be, when the attesting witnesses are dead that all the circumstances tending to show their attestation in the presence of the testator cannot be proven. The establishment of that fact, we take it, may be proven by circumstances as well as by direct or positive evidence. Indeed, were the witnesses living the fact of their attestation in the presence of the testator, when controverted, we doubt not, might be shown by circumstantial evidence. Otherwise, proof of the execution of a will would be restricted to the testimony of the witnesses attesting it and its probate dependent upon their veracity. Such a rule would place it in the power of a single witness, to defeat its probate and effectually destroy it. Indeed this result would follow, should the witnesses, though honest and truthful, be unable to recall the fact of attestation in the presence of the testator. The circumstances bearing

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upon the execution of the will, as detailed by Mrs. Hundley, were clearly competent.

The evidence with respect to the revocation of the will by tearing was substantially the same on this trial as upon the former. In our opinion heretofore, we held, after a careful and thorough consideration of the question, that no act of revocation had been shown, and that all declarations of the testatrix subsequent to the making of the will tending to show that she had revoked it were clearly incompetent. We adhere to what we said in that opinion upon this question as well as upon the one involving the proof of its execution. There was no error in the exclusion of the declarations of the testatrix offered by the contestant. So, too, the fact that the testatrix had, before her death, conveyed certain property, or that she had offered or attempted to sell certain other property, that certain beneficiaries named in the will were not of kin to her, or were dead, or that there had been a change in the testatrix's church relations, or the estrangement between the testatrix and the contestant's father had passed away some time before her death, were incompetent. None nor all of these things were nor could be evidence of a revocation.

The assignments of error are so numerous, that it is impracticable to treat each of them separately. However, all of those insisted upon in argument and based upon exceptions reserved to the admission of testimony are disposed of by what we have said. We have only left for consideration written charges given at the request of the proponent and those refused to the contestant. As to those given for proponent, there was clearly no error. There was an entire absence of evidence to support the grounds of contest designated in each of them. As to those refused to contestant, only one is insisted upon—No. 13. This charge was clearly misleading if not wholly bad. The rule is "if any theory consistent with the validity of the will can be suggested, which appears to the court to be as probable as the theory, on which the argument for the invalidity is based, the will as found must be maintained."—*Barnewall v. Murrell*, 108 Ala. 379, 380.

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There is no error in the record, and the decree of the probate court admitting the will to probate is affirmed.

Clem v. Wise.

Statutory Action of Detinue.

1. *Evidence; admissibility of paper signed by directors of corporation.*—A writing signed by directors of a corporation, reciting the meeting of the board and stating that by unanimous consent of the board of directors, the corporate assets were sold to a designated person and authorizing the president of the corporation to transfer all of the corporation's interest in its assets to said person, is admissible as evidence of a sale and the authority of the president to make the transfer in behalf of the corporation, in connection with a by-law of the corporation providing that the corporate powers of the company were vested in the board of directors, and the oral testimony of the president that said sale and transfer were made.
2. *Action of detinue; when sufficient transfer of mortgage.*—In an action of detinue, where the plaintiff claims the property sued for under a mortgage alleged to have been transferred to him by a corporation, which mortgage was shown to have been lost, and the president of the corporation testified that he delivered and transferred to the plaintiff said mortgage, but did not write out any transfer thereof on the back of the mortgage until after the suit was brought, such evidence is sufficient to carry to the jury the question whether or not the plaintiff was the legal owner of the mortgage.
3. *Assignment of mortgage; right of transferee to maintain suit for mortgaged property.*—Under a transfer which is not merely of the debt, but which is appropriate to pass title to the security, the transferee can maintain a suit at law for the mortgaged property.
4. *Jurisdiction of justice of the peace; waiver of objection.*—On an appeal from a judgment of the justice of the peace, his want of jurisdiction can not be availed of unless the objection thereto was made before the justice of the peace; and the question comes too late if presented for the first time on motion for a new trial in the circuit court where the cause was carried on appeal.

[Clem v. Wise.]

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. H. C. SPEAKE.

This was a statutory action of detinue brought by the appellee, George W. Wise, against the appellant, Wiley Clem, to recover two mules. The suit was originally commenced in a justice of the peace court and from a judgment rendered in said court in favor of the plaintiff the defendant appealed to the circuit court. In the circuit court the plaintiff filed a new complaint for the recovery in detinue of the same mules.

On the trial of the case it was shown that one J. M. Todd, on January 17, 1898, executed a mortgage upon the mules involved in the controversy to the Wise Mercantile Company, a corporation organized to carry on the mercantile business, and that this mortgage was duly recorded in the probate office. The loss of this mortgage was proved and a certified copy of said mortgage taken from the records in the office of the judge of probate was introduced in evidence.

The plaintiff, as a witness in his own behalf, testified that he was formerly president of the Wise Mercantile Company; that he and J. H. Humphrey and J. R. Martin were the stockholders and directors of said Wise Mercantile Company; that he, the plaintiff, purchased from the Wise Mercantile Company the mortgage, a copy of which was introduced in evidence, together with the other property owned by said mercantile company. The plaintiff then introduced in evidence the following writing, signed by G. W. Wise, J. H. Humphrey and J. R. Martin: "The Board of Directors of the Wise Mercantile Co. met today and by unanimous consent sold the entire business interests and goods and chattels, accounts, notes and mortgages to Geo. W. Wise, and we hereby authorize the president of the Wise Mercantile Co. to transfer all its interest to said Geo. W. Wise, for which he is to collect from said Geo. W. Wise full face value of all stock and such dividend as is shown when trial balance is gotten off, and to pay such amount as may be due to each stockholder, for which he is to receive and cancel all capital stock outstanding. The president is also hereby authorized to

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have the charter cancelled on record, so as to show that the Wise Mercantile Co. is no longer a corporation, and has gone out of business." The defendant objected to the introduction of said paper in evidence upon the grounds: 1. That it did not appear that it was executed by any one authorized and competent to execute it. 2. That it did not appear that the same was a valid transfer to the plaintiff. The court overruled the objection, allowed the paper to be introduced in evidence, and the plaintiff duly excepted. The plaintiff then introduced in evidence the following by-law of the Wise Mercantile Company: "The corporate powers of this company are vested in a board of three (3) directors, who shall be elected annually by a majority of stock voted from among the stockholders, and shall hold office until succeeded."

The further testimony of the plaintiff relating to his taking possession of the assets of the mercantile company after its sale to him, is copied in the opinion.

J. M. Todd, as a witness for the plaintiff, testified that prior to the execution of the mortgage upon the mules sued for to the Wise Mercantile Company, he executed a mortgage upon the same mules to one Bingham, but that the mortgage to Bingham was not recorded until a year after the registration of the Wise Mercantile Company mortgage; that said Bingham took possession of the mules from the witness Todd after the execution and registration of the mortgage given to the Wise Mercantile Company, and he carried said mules to Limestone county and sold them to the defendant, who knew of the mortgage held by the Wise Mercantile Company, and that said Bingham also knew of the existence of the mortgage to the Wise Mercantile Company. The value of the mules was shown to be from \$60 to \$75 each, and the value of the hire or use of them was shown to be \$20.

Upon the plaintiff being reintroduced as a witness, he testified that he had no knowledge or notice of any kind of the existence of the mortgage given by Todd to Bingham; that after the Wise Mercantile Company mortgage became due he learned that the defendant had

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the mules, and that he demanded them of the defendant, who refused to surrender them.

Upon the introduction of all the evidence for the plaintiff, the defendant moved the court to exclude the plaintiff's evidence upon the following grounds: 1. It was not shown that the mortgage was transferred to the plaintiff. 2. It was not shown that the paper signed by the directors of the Mercantile Company was executed by any one competent to execute it. 3. Said paper did not constitute a valid assignment and transfer of the mortgage in question. 4. It was not shown that said mortgage was the property of the plaintiff, upon which he could maintain a suit. The court overruled this motion and the defendant duly excepted.

There were several charges requested by the plaintiff and the defendant, but under the opinion on the present appeal it is unnecessary to set them out in detail.

There was verdict returned in favor of the plaintiff, assessing the value of the mules at \$60 each, and the damage for the detention of the mules at \$20.

The defendant filed a motion for a new trial upon the ground, among others, that the court erred in allowing the jury to return a verdict for a sum greater in value than the jurisdiction of the justice of the peace, and because the verdict of the jury shows that the court had no appellate jurisdiction of the case. This motion for a new trial was overruled, and the defendant duly excepted. The judgment of the court was that the plaintiff have and recover of the defendant and the sureties on his replevy bond "said sum of one hundred and twenty dollars, the alternate value of said property, besides the sum of twenty dollars damages for the detention of the same, besides the costs in this behalf expended, for the collection of which let execution issue." The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

THOS. C. MCCLELLAN, for appellant.—"The general rule is, that to maintain detinue, or corresponding statutory action for the recovery of chattels in specie, the

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plaintiff must be clothed with the legal title, or must have the right to the immediate possession of the goods sued for" at the commencement of the suit.—*Bouldin v. Organ Co.*, 92 Ala. 182; *Graham's Case*, 74 Ala. 432; *Russell v. Walker*, 73 Ala. 315; *Reese v. Harris*, 27 Ala. 301; 3 Brick. Dig., 306, § 3.

To constitute a valid assignment or transfer of a chattel mortgage so as to invest in the assignee a sufficient title or right on which such assignee may maintain detinue the assignment or transfer must be in writing endorsed on the mortgage. There can be no parol transfer, as here involved, or transfer by delivery merely, of a chattel mortgage as to give to the assignee a detinue-maintaining title.—Code, § 2151; *Gafford v. Lofton*, 94 Ala. 333; *Tilson's Case*, 57 Ala. 331; *Russell v. Walker*, 73 Ala. 315; Jones on Chat. Mort., § 517; *Hodges v. Wilkinson*, 17 L. R. A. 545; *Black's Case*, 116 Ala. 90; *Jackson's Case*, 73 Ala. 155; *Fulgham v. Morris*, 75 Ala. 245.

Where the amount of the verdict exceeds the amount claimed by the plaintiff, or of jurisdiction, a motion for a new trial is the proper remedy.—Code, § 2662 and authorities cited to subdivision 4; 1 Brick. Dig., 776, §§ 39, 40, and authorities there cited; *Carter v. Alford*, 64 Ala. 236; *Smith v. Dick*, 95 Ala. 311.

W. T. SANDERS, *contra*, cited 2 Am. & Eng. Ency. Law, 1057; *Bolin v. Sandlin*, 27 So. Rep. 464; *L. & N. R. R. Co. v. Barker*, 96 Ala. 435; *West. R. v. Lazarus*, 88 Ala. 453; *Burns v. Henry*, 67 Ala. 209; *Glaze v. Blake*, 56 Ala. 379.

SHARPE, J.—If it be conceded that the writing signed by the directors of the mercantile corporation was, as is contended for appellant, "no more than a minute of what was done at a directors' meeting," and that it did not operate in itself to transfer the mortgage through which the plaintiff claimed the property sued for, yet as a minute of such meeting it was, in connection with the by-law vesting the power of the corporation in the directors and the plaintiff's oral testimony, admissible as evidence of a sale and as authority in

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plaintiff as president to make the transfer in behalf of the corporation.

The bill of exceptions shows plaintiff testified without objection "that he as president of said company delivered and transferred to himself individually all of the assets of said corporation and became the absolute owner thereof, and as such president delivered and transferred to himself as an individual the said mortgage above referred to; that he did not write out any transfer of said mortgage on the back thereof until after the suit was brought." This testimony, together with the writings introduced in evidence was sufficient to carry to the jury the question of whether the plaintiff was the legal owner of the mortgage, because from it they could have inferred the execution of such transfer, other than by indorsement, as may have been necessary to create his ownership. For that purpose a separate writing could have been made as effectual as a writing on the mortgage itself. The case of *Gafford v. Lofton*, 94 Ala. 333, and other authorities cited by appellant as opposed to this proposition show that a chattel mortgage may be legally assigned by an indorsement thereon, but they do not negative the validity of separate assignments.

Under a transfer which is not merely of the debt but which is appropriate to pass title to the security, the transferee may maintain a suit at law for the mortgaged property.—*Gafford v. Lofton*, *supra*; *Tison v. People's etc. Ass'n.*, 57 Ala. 323; *Hodges v. Wilkinson*, 17 L. R. A. (N. C.), 545; *Mayer v. Soulier*, 48 Mich. 411; *Barbour v. White*, 37 Ill. 165; *Langdon v. Buel*, 9 Wend. 80.

If the property was of value greater than one hundred dollars when the suit was pending in the justice's court that fact might have been there pleaded to the jurisdiction, but objection to the jurisdiction not having been made in that court, was not available as presented for the first time on the motion for new trial in the circuit court.—*L. & N. R. R. Co. v. Barker*, 96 Ala. 435; *Western R. Co. v. Lazarus*, 88 Ala. 453; *Glaze v. Blake*, 56 Ala. 379; *Burns v. Henry*, 67 Ala. 209.

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The judgment is irregular in that it is not rendered against the defendant alone for the property or its value in the alternative, (Code, § 1476) ; but this irregularity is not assigned as error.

The assignments of error not insisted on in briefs are regarded as waived.

Affirmed.

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Action for Statutory Penalty.

133 400
141 670

1. *Pleading and practice; error without injury; appeal.*—Where in the trial of a case after the plaintiff's demurrers to special pleas are overruled, and his replications to the special pleas are stricken from the file, he declines to take issue on the special pleas and takes issue on the plea of the general issue, but introduced no evidence in support of his complaint, any error in the rulings of the court on the pleadings are without injury, and he can not have such rulings reviewed on appeal.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. O. KYLE.

This suit was brought by the appellant, J. C. Cross, against the appellee, B. F. Esslinger, to recover the statutory penalty under section 1065 of the Code of 1896, for failure to mark partial payment on the margin of the record of a mortgage, after request in writing. The defendant pleaded the general issue and two special pleas, Nos. 2 and 3. The plaintiff demurred to these pleas, which demurrers were overruled. Thereupon the plaintiffs filed several replications to the second and third pleas. The defendant moved the court to strike these replications from the file upon the ground that they present no facts that could arise on the joinder of issue upon the pleas to which the replications were filed, and because said replications were no answer to the said pleas. The court sustained this motion and ordered the replication stricken from the file. The

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judgment entry recites: "Plaintiff declining to plead further and no evidence being taken, issue being joined upon the plea of the general issue, thereupon comes a jury," etc.

Judgment was rendered in favor of the defendant. The plaintiff appeals, and assigns as error the rulings of the court upon the evidence.

J. H. BALLENTINE, for appellant.

No counsel marked as appearing for appellee.

MCCLELLAN, C. J.—The appellant is in no plight to have this court review the rulings of the circuit court on his demurrer to the special pleas and on the motion of defendant to strike his replications to said special pleas. The demurrer to the special plea having been overruled, and the replications to said pleas having been stricken, there was left in the case defendant's pleas of the general issue and special pleas 2 and 3. Plaintiff then declined to take issue on the special pleas and took issue on the plea of the general issue. Whereupon a jury came, but, as the judgment entry shows, *the plaintiff offered no evidence* in support of his complaint, and verdict of course went for the defendant on the plea of the general issue, and judgment was entered accordingly. The plaintiff should have taken issue not only on the plea of the general issue, but also on the special pleas, and should have proved his complaint under the general issue and thereby put the defendant to proof of the special pleas. It is of no consequence that the plaintiff considered that the defendant would recover on the special pleas, however fully the case might be made out for plaintiff on the general issue. The circuit court could not know this in the absence of evidence, nor can we. The case stands here essentially as if the plaintiff had declined to take issue on the plea of the general issue as well as upon the special pleas, and the legal presumption in both cases is that the plaintiff could not prove the cause of action laid in the complaint, that the defendant was entitled to judgment on his denial of that cause of action—the general issue;

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and the conclusion is that, inasmuch as plaintiff had no cause of action, he was in no sense or degree injured by the rulings on the demurrer to the special pleas and the motion to strike the replications, be those rulings never so erroneous.—*Andrews v. Hall et al.* 132 Ala. and cases there cited.

Upon the foregoing considerations, the judgment of the circuit court must be affirmed.

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Action for Trespass.

133	411
135	128
135	639
133	411
141	341
141	342

1. *Adverse possession; can not arise from premissive entry.*—Where entry is made upon land by permission of the owner, the possession following such entry is not adverse, but is in subordination to the rightful title.
2. *License to enter land; when in parol revocable; estoppel.*—A parol license to do an act upon the land of another is revocable at the option of the licensor, although the licensee has performed acts thereunder, or has expended money in reliance thereon; and the fact that the license is executed or that money has been expended by the licensee does not equitably estop the licensor from revoking the license.
3. *Same; revoked by sale.*—A license to do or perform an act upon the lands of another being a personal privilege, is revoked by the death of the licensor or by his conveyance or the lands to another, or whatever would deprive him of doing the acts in question or giving permission to others to do them.
4. *Same; can not ripen into an easement.*—Since an easement is an interest in or over the soil of another, a mere parol license to do an act upon the land of the licensor can not ripen into an easement, conferring any permanent interest in said land, which is not revocable by sale thereof.
5. *Trespass; recovery of exemplary or vindictive damages.*—In an action of trespass, exemplary or vindictive damages are recoverable if the trespass is committed with a bad motive, with an intent to harrass or oppress or to injure.

APPEAL from the Circuit Court of Autauga.
Tried before the Hon. A. H. ALSTON.

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Appellants on the 7th day of September, 1900, instituted the present action of trespass in the circuit court of Autauga county, against the appellee, alleging that the plaintiffs being the owners of land which is known as "The Jim Nunn Creek Place," defendant "constructed, and has since, without the consent of the plaintiffs, maintained on said lands, a ditch for the purpose of floating logs down the same to Autaugaville to the mill of the defendant; that in constructing the said ditch, and to provide a supply of water, said defendant, at the point on said land where said ditch crosses what is known as 'Pineywoods' or 'Pine Creek,' which latter creek flows easterly across said lands to Swift creek and accorded drainage to said lands, erected a dam across said Pine Creek, whereby the waters accustomed to flow along said Pine Creek into Swift Creek were prevented from so flowing away, and the channel of said Pine Creek was so filled up that on occasions of heavy rains the said water and sand, instead of flowing as it was and is accustomed to flow into the said Swift Creek, has flowed out of the said channel of Pine Creek, * * * over and across the lands of the plaintiffs and out of said ditch over and across the plaintiffs' lands," causing damage, etc.; that said ditch and obstruction had been maintained, and said ditch used and operated by the defendant for a period of one year, and ever since the plaintiffs became the owner of said lands; and that plaintiffs have sustained damage to the amount of \$5,000, for which they sue.

In addition to the facts stated in the opinion, the plaintiff introduced evidence tending to show that from the date of the plaintiffs' purchase of the lands to the bringing of the present suit, the defendant used said ditch and dam for floating the logs in and down said ditch to the plaintiffs' lands.

There was evidence tending to show damage to the lands from the overflow of Pine Creek (across which the dam was erected) in case of heavy rains during said period, on account of said dam in the way of rendering the land too wet for cultivation and in depositing sand thereon, and the amount of such damage. But the evi-

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dence on this point was contradictory—the defendant's evidence tending to show that there was no damage to the land, and none resulting from the ditch or dam, and that if there was any damage to the lands at all, it was on account of the overflow of Swift Creek by unusual and extraordinarily heavy rains, and not on account of the said ditch or dam. The evidence further tended to show that plaintiffs made claim of the defendant within a few months after they purchased the land, for rent, they made no objection to the structures being there, but wanted rent for the land, and that the defendant continued to operate said structures, until the time of bringing this suit.

It was also shown without conflict that the erection of the said dam and ditch was made at great cost and expense of money and labor to the defendant, and that said permission was obtained before said work was done; that the defendant was then and has since been engaged in operating a saw mill in Autauga county, for squaring timber for market, and that said ditch was used for the purpose of floating logs from the defendant's lands to the said saw mill. There was no evidence that the dam or ditch was erected or operated in a negligent manner, and there was no evidence that the defendant had done anything with reference to the said ditch or dam since the purchase by the plaintiffs except to run logs down said ditch to the defendant's mill, and it did not appear that any special damage complained of by the plaintiffs resulted from the running of the said logs.

The court in its general charge to the jury instructed them that the plaintiffs were not entitled to recover, except for damages, if any were shown, resulting from negligent operation and maintenance of the dam and ditch mentioned in the complaint. The plaintiffs separately excepted to this portion of the court's oral charge. The court further charged the jury that if the ditch and dam complained of were constructed prior to the time the plaintiffs purchased the land, and by and with an agreement, or consent of Norwood Smith, who then owned the land, and the defendant was using and operating the ditch and dam under such consent and agreement when the plaintiffs purchased in 1899, and the

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plaintiffs when they purchased were informed of this fact, then they took the lands in that condition, and could not claim damages of the defendant for the reasonable and careful operation and use of said structures by the defendant for the purposes for which they were constructed. To the giving of this charge the plaintiffs excepted.

Plaintiffs requested the court to give to the jury, among others, the following written charges: (1.) "If the defendant had notice that the land upon which they entered was the plaintiffs, and if with such notice the defendant persisted in entering upon the same for the period between the purchase of the land to the bringing of this suit, without the consent of the plaintiffs, this is evidence tending to show malice and a reckless disregard of the property right, for which, in the discretion of the jury, exemplary damages may be awarded." (4.) "That there is in this case no evidence of any legal authority in the defendant to enter upon the plaintiffs' land, and maintain and operate its ditch across the plaintiffs' land." The court refused to give each of the charges asked by the plaintiffs, and the plaintiffs separately excepted.

The court at the request of the defendant gave to the jury, among others, the following written charges: (B.) "The court charges the jury that the plaintiffs can recover no damages to the lands known as the Jim Nunn Creek Place, except for such damages as may have been occasioned after their purchase of said lands, and prior to the bringing of this suit." (F.) "The court charges the jury that if the ditch and dam complained of were cut and made by the defendant in 1896, by and under a license from the then owner of said land, and it required the expenditure of money and labor to cut the ditch and make the dam, then the defendant's use of the ditch and dam has not been wrongful and the plaintiff can not recover in this action." (J.) "The court charges the jury that if the ditch and dam complained of were constructed during the year 1896, by and with an agreement and consent of Norwood Smith, who then owned the land, known as the Jim Nunn Creek Place, and de-

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fendant was using and operating said ditch and dam under such consent and agreement when plaintiff's claim to have purchased said land in 1899, and plaintiffs were informed of this fact when they purchased, then the plaintiffs can not recover of the defendant in this case." (K.) "The court charges the jury that if they are reasonably satisfied from the evidence that prior to the purchase of the lands known as the Jim Nunn Creek Place by the plaintiffs and while said lands were owned by Norwood Smith, and the defendant constructed the ditch and dam in question on said land, by and with the consent and agreement of said Smith, and said ditch and dam were on said lands at the time plaintiffs purchased the same, and were being then used and operated by the defendant in the same manner it had been used previous to plaintiffs' purchase, and that defendant has been guilty of no negligence in the operation of said ditch and dam since the purchase of said lands by the plaintiffs, then your verdict should be in favor of the Swift Creek Mill Co." To the giving of each of these charges the plaintiffs separately excepted.

There were verdict and judgment for the defendant. The plaintiffs appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

GUNTER & GUNTER, for appellant.—There is no use in discussing the question of adverse possession in any aspect as avoided the operation of the conveyance to the plaintiffs, as there was no purchase or contract of purchase with the defendant by the former owner, and because in case of a license merely, there is no adverse possession against the owner.—*Wiseman v. Luckinger*, 84 N. Y. 44; *St. Vincent v. Troy*, 76 N. Y. 108; *Jackson v. Babcock*, 4 John. 418; *Luce v. Carley*, 24 Wend. 451.

A license to construct and operate a ditch across lands conveys no interest in the land and is revoked by a conveyance of the land. The right to maintain and operate a ditch over or across land, for any purpose, is an interest in the land, and no contract for such a right is operative in law, unless it is in writing and subscribed, as provided by the statute of frauds.—10 Ency. of Law,

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(2d ed.), 398-9; *Shirley v. Crabb*, 139 Ind. 200, 46 Am. St. Rep. 379; *Riddle v. Brown*, 20 Ala. 412; *Clanton v. Scruggs*, 95 Ala. 279; *McMahon v. Williams*, 79 Ala. 268; *Franklin v. Pollard Mill Co.*, 88 Ala. 318; *Hammond v. Winchester*, 82 Ala. 470; *Tillis v. Treadwell*, 117 Ala. 445.

"An easement implies an interest in the land in or over which it is enjoyed.—*Roughbotham v. Wilson*, 8 El. & Blac. 123; Washburn on Easements, 69. While a license carries no such interest, and is revocable at the will of the owner of the servient estate."—Notes to 6 Law. Rep. 159; *Veghte v. Baritan*, 19 N. J. Eq. 153; *Ex parte Courbern*, 1 Cow. 568; *Wolfe v. Frost*, 4 Sandf. 72; *Foster v. Browning*, 4 R. I. 47; *Murdock v. Whitney*, 15 Wend. 381; *Miller v. A. & S. R. R. Co.*, 6 Hill. 61; *Selden v. D. & H. R. R. Co.*, 29 N. Y. 639; *Babcock v. Utter*, 1 Keyes, 397; Washburn on Real Property, 542, and cases cited.

A parol license to do certain acts on land is revocable, not only at the will of the owner of the property, but also by his death, by alienation or demise, and by whatever would deprive the original owner of the right to do the acts in question, or give permission to others." *Hadkins v. Farrington*, 150 Mass. 19; *White v. Railway Co.*, 139 N. Y. 24; *Welsh v. Taylor*, 134 N. Y. 450; *Wheelock v. Noonan*, 108 N. Y. 148; *DeHaro v. U. S.*, 5 Wall. 627; *Bixby v. Bent*, 59 Cal. 529; *Spacy v. Evans*, 152 Ind. 432; *Nunnally v. S. I. Co.*, 94 Tenn. 410, 28 L. R. A. 428; *Ricker v. Kelly*, 10 Am. Dec. 41, 2-3, notes.

When any trespass is knowingly committed and is continuous and is persisted in after notice, no stronger case for exemplary damages for trespass to property can be stated.—*Vase v. Stickney*, 8 Minn. 81; *Seeman v. Feeney*, 19 Minn. 82; *Farwell v. Warren*, 51 Ill. 467; *Clerenger v. Dunaway*, 84 Ill. 367; *Trauerman v. Lippincott*, 39 Mo. App. 478; *Goetz v. Ambts*, 27 Mo. 28; *Lynd v. Pickett*, 82 Amer. Dec. 89; 15 Cen. Dig. 1891, et seq.

LOMAX, CRUM & WEIL, *contra*.—A license, as a term of real estate law, we understand is, "an authority to do a particular act or series of acts upon the lands of an-

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other without possessing any estate therein." It may be created by writing, by parol or it may be inferred from circumstances in the relationship of the parties. The licensee has the right to do anything which is necessary for the full enjoyment of the license, so long as he acts within the terms of the license, and is entitled while so acting, to complete protection.

While some of the States have held that a parol license so executed is revocable, this court, with those of a majority of the other States, and following, as the authorities frequently say, "the most reasonable and better rule of law," has expressly held that an executed parol license, where the licensee has gone to expense in consequence thereof, is *irrevocable*,—upon the theory that the revocation under such circumstances would clearly *work a fraud upon the licensee*, and that the licensor by standing by and allowing the licensee to make expenditures, relying upon the license, has estopped himself from revoking the license.—13 Am. & Eng. Encyc. of Law (2d ed.), 1145; *Rhodes v. Otis*, 33 Ala. 578; *Rerick v. Kern*, 16 Am. Dec. 497; *Ricker v. Kelly*, 10 Am. Dec. 38; *DeGraffenried v. Savage*, 9 Col. App. *Ferguson v. Spencer*, 127 Ind. 66; *Buchanan v. Railroad Co.*, 71 Ind. 265.

A license, not creating an easement nor giving rise to an interest in land, is *not within the statute of frauds*, and need not be in writing. The form of the authority is immaterial and does not affect its nature, and a written license, even though under seal, has only the same effect as an oral license. The statute of frauds, we insist, has no application to this case.—18 Am. & Eng. Encyc. Law (2d ed.), 1130; *Rhodes v. Otis*, 33 Ala. *supra*; *Sampson v. Burnside*, 13 N. H. 264; *Fenlimen v. Smith*, 4 East. 108; *Taylor v. Waters*, 7 Taunt. 374; *Cook v. Stearns*, 11 Mass. 536; *Ricker v. Kelly*, 10 Am. Dec. 38; *Hazelton v. Putnam*, 54 Am. Dec. 158; *Woodbury v. Parshly*, 26 Am. Dec. 739.

If, therefore, the licensor could not have maintained an action of trespass against appellee for the use of the ditch so constructed, as we think we have clearly shown, his grantors, appellants here, took no right superior to

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him. Certainly he could not indirectly do what he could not do directly. See also *Williams v. Flood*, 63 Mich. 487; *Campbell v. R. R. Co.*, 110 Ind. 490; *Buchanan v. Railroad Co.*, 71 Ib. 265; *McKellip v. McIlhenny*, 28 Am. Dec. 711; *Snowden v. Wilas*, *supra*; *Simons v. Moorhouse*, 88 Ind. 395; *Stevens v. Benson*, 19 Ind. 369; *Prince v. Case*, 27 Am. Dec. 675.

TYSON, J.—Practically but a single question is presented for our consideration and determination. It is whether the defendant, who is sued for a trespass upon the plaintiffs' lands, acquired an irrevocable license from the plaintiffs' grantor to use and maintain a ditch and dam for the purpose of floating logs. The facts, out of which this question arose, are undisputed and are these: One Smith, being the owner of the lands, in 1896 gave verbal permission to the defendant to construct and operate the ditch and dam upon them, which was done by it at great cost. In August, 1899, the plaintiffs became the owners of the lands by deed upon which these structures were constructed, and went into possession of them, with full knowledge that the defendant was actively using and operating the ditch and dam, claiming the right to do so, under the permission given them by Smith.

Preliminary to a discussion of the question, it may not be amiss to say that, under these facts, no question of adverse possession can possibly arise. The entry by defendant being permissive, its possession was not adverse, but was in subordination of the rightful title. *Collins v. Johnson*, 57 Ala. 304; *Jesse French Piano Co. v. Forbes*, 129 Ala. 471; 18 Am. & Eng. Ency. Law (2d ed.), 1130.

It is not insisted by appellee that the permission granted to it created an easement. Clearly such an insistence, if made, would be untenable, for the reason that it would have required a deed to have conveyed such a right. For "an easement must be an interest in or over the soil," and does not lie in livery, but in grant. Wash. on Easements, p. 6; 10 Am. & Eng. Ency. Law (2d ed.), 409; Jones on Easements, § 80; Brown on

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Statute of Frauds, § 232. The difference between an easement and a license is, the former implies an interest in land, while the latter does not. An easement must be created, as we have said above, by deed or prescription, while a license may be by parol. The former is a permanent interest in the realty, while the latter is a personal privilege to do some act or series of acts upon the land of another without possessing any estate therein, and is generally revocable at the will of the owner of the land in which it is to be enjoyed.—Wash. on Easements, *supra*; Jones on Easements, § 63. And when revocable, it is revoked by the death of the licensor, by his conveyance of the lands to another, or by whatever would deprive him of doing the acts in question or giving permission to others to do them.—*Hodgkins v. Farrington*, 5 L. R. A. 209; 18 Am. & Eng. Ency. Law, p. 1141 and note 10; Jones on Easements, § 73 and note 4. Confessedly the license to the defendant in this case was revoked by the conveyance of Smith, from whom it acquired it, unless he estopped himself to do so. And that it is insisted he did because the defendant has been at great cost in constructing the ditch and dam, being induced to do so under the permission granted to it. It is further contended that the license has become an executed one and, therefore, irrevocable. To use the language of Baron Parke: "It certainly strikes one as a strong proposition to say that a license can be irrevocable, unless it amounts to an interest in the land."—*Williams v. Morris*, 8 Mess. & W. 488. To say nothing of so thin and gauzy attempt to evade the provision of the statute of frauds, requiring a sale of all interest in lands to be in writing except leases for a term not longer than one year; unless the purchase money, or a portion thereof, be paid and the purchaser be put in possession of the land by the seller.—Subdiv. 5 of § 2152 of Code. In other words we are asked to hold, although the license to the defendant when granted was not intended by either party, to be anything more than a mere personal privilege to it, revocable by Smith at his will, and knowing as it did, that under this license it acquired no interest whatever in the lands, that forsooth, with a knowledge of all these facts,

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it acquired an indefeasable title to an easement over them because it expended money in constructing the ditch and dam. For it is too plain for argument, that if Smith is estopped to revoke the license, all others who may acquire his title would be and the defendant would enjoy a fee simple title to an easement, which had its origin in a mere license, and this too without paying one cent of consideration therefor, to say nothing of so plain and palpable violation of the statute of frauds. Smith is not so much as shown with or without consideration, to have made any promise that he would not exercise his privilege of revoking the license. And there is no pretense that he made any misrepresentation of any fact that induced the defendant to expend its money. The broad proposition is asserted that because he granted the license, knowing the purpose for which it was to be used, that he could never revoke it, because it would be a fraud to allow him to do so, and because it has become executed. We are aware that many courts hold this contention to be sound, but we cannot subscribe to it. Reason and the great weight of authority are against it. In Browne on the Statute of Frauds, § 31, it is said: "In some of the earlier decisions, both English and American, the licensee was protected against revocation, on the ground that the licensor was estopped to revoke a license on the faith of which the licensee had incurred expense; but is now well settled that the doctrine of estoppel does not apply, inasmuch as the licensee is bound to know that his license was revocable, and that in incurring expense he acted on his own risk and peril. Courts of equity also have repeatedly declined to interfere on this ground." See also note 3 for cases cited to this.

In Jones on Easements, section 84, it is said: "An oral promise to grant an easement is not sufficient to raise an estoppel in favor of one who has acted upon it. In a case not relating to easements Mr. Justice GRAY states a principle which is applicable to this subject: 'A promise, upon which the statute of frauds declares that no action shall be maintained, cannot be made effectual by estoppel merely because it has been acted

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upon by the promisee and not performed by the promisor.' ”

In 18 Am. & Eng. Ency. Law (2d ed.), p. 1146, it is said: “According to the prevailing view of the courts in England and a large number of the courts of the states of the United States, neither the execution of the license nor the incurring of expense, nor both combined, affect the right of the licensor, and he may revoke under all circumstances. It is held that the statute of frauds prevents any act other than the giving of a deed from vesting an irrevocable interest in land.” See cases cited in note 7 in support of this proposition.

Mr. Freeman in his note to *Lawrence v. Springer*, 31 Am. St. Rep. 713 and 715, says: “A parol license is founded in personal confidence, and is defined to be an authority given to do some act, or a series of acts, on the land of another, without passing any interest in the land; * * * is a complete answer and defense to a claim of adverse possession set up by the licensee, * * * and not assignable. * * * At common law a parol license to be exercised upon the land of another creating an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon. In many of the states this rule prevails, while in others the licensor is deemed to be equitably estopped from revoking the license, after allowing the licensee to perform acts thereunder, or to make expenditures in reliance thereon. These two lines of cases cannot be reconciled; for one of them holds that an interest in land cannot be created by force of a mere parol license, whether executed or not, while the other declares that where the licensee has gone to expense, relying upon the license, the licensor may be estopped from revoking it, and thus an easement may be created. The former line of cases, it seems to us, is founded upon the better reason. They decide that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable, at the option of the licensor, and this, although

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the intention was to confer a continuing right, and money has been expended by the licensee upon the faith of the license. Such license cannot be changed into an equitable right on the ground of equitable estoppel."

Case after case might be cited to support the principles announced by these text-writers, but they are too numerous to do so here. They can be found by reference being had to the notes referred to in the text quoted. However, before examining the decisions of our own court, we will refer to the case of *Thoenke v. Fiedler*, 91 Wis. 386, because of its striking analogy to the one in hand. We quote from a part of the opinion: "The oral agreement under which the ditch across the defendant's land was made did not create an easement in the land. An easement is a permanent interest in the lands of another, with a right to enjoy it fully and without obstruction. Such an interest cannot be created by parol. It can be created only by a deed or by prescription. But this agreement did not have the effect of a parol license. A license creates no estate in lands. It is a bare authority to do a certain act or series of acts upon the lands of another. It is a personal right and is not assignable. It is gone if the owner of the land who gives the license transfers his title to another, or if either party die. So long as a parol license remains executory, it may be revoked at pleasure. So an *executed* parol license, under which some estate or interest in the land would pass, is revocable. Otherwise title would pass without a written conveyance, 'in the teeth of the statute of frauds.' Nor is such a license made irrevocable by the fact * * * that expenditures have been made on the faith of it. * * * Nor can the parol agreement be enforced in equity by way of specific performance."

We will now examine our own cases. In *Riddle v. Brown*, 20 Ala. 412, it was held that the right "to dig and carry away iron ore" from the mine of another is an easement; and any contract for the sale of such right, to be binding, must be in writing. That a verbal contract conferring such a right, though not binding under the statute of frauds, will nevertheless ope-

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rate as a verbal license and while unrevoked, will protect the person to whom it was given, from trespass *quare clausum fregit*, for digging ore and vest in him the property in the ore that was actually dug under it; but that it is revocable, at the pleasure of the party by whom it was given, and was personal and not assignable.

In *Motes v. Bates*, 74 Ala. 378, it was said: "We find no evidence in the record, tending to show that the plaintiff, Bates, had any claim of legal right to be upon this portion of the defendant's field. It is shown that the lessee agreed to use the public road; and his employes, or sub-tenants, had no greater rights than he had. If the plaintiff's alleged custom in using the pathway, for some time previous, could be construed into a permission by defendant to do so, this was, at best, only a parol license, *which was revocable at the pleasure of the person giving it*. Every license of this kind, by which one is permitted without consideration, to pass over the lands of another, is essentially revocable in its very nature, its continuance depending upon the mere will of the person by whom it was created or granted." Citing approvingly *Riddle v. Brown*, *supra*.

In *Tillis v. Treadwell*, 117 Ala. 448, quoting from *Rudisill v. Cross*, 54 Ark. 519, where it was held: "The obligations of a land owner to build and maintain a division fence, in whole or in part, for the benefit of adjoining land, is something more, indeed, than an obligation to furnish the materials and labor necessary from time to time for the erection and reparation of the fence; it imposes a burden upon the land itself. A partition fence ordinarily must rest equally upon the land of the respective proprietors. Hence an agreement of one of those proprietors to maintain such a fence necessarily imports a dedication of the use of the land required to support half of it. To that extent it is, therefore, an estate in the land itself. In accordance, then, with the general rule that an easement, being an interest in realty, cannot be conveyed or reserved by parol, an agreement by an owner of land to maintain a partition fence between such land and that of an adjoining proprietor cannot ordinarily rest in parol, but to be

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binding, must be in writing." Our court then proceeds: "A grant to an adjoining proprietor of the use of a wall on his own premises, as a partition wall between their buildings, is the grant of an easement, and a parol agreement to build and grant the use of such wall is within the statute. * * * Under our decisions parol agreements for the grant of easements are void under the statute.—*Riddle v. Brown*, 20 Ala. 412; *Hammond v. Winchester*, 82 Ala. 470." See also the following cases in which *Riddle v. Brown* is cited approvingly: *Heflin v. Bingham*, 56 Ala. 575; *Chambers v. Ala. Iron Co.*, 67 Ala. 357; *L. & N. R. R. Co. v. Boykin*, 76 Ala. 564; *Motes v. Bates*, 80 Ala. 368; *Hammond v. Winchester*, 82 Ala. 477.

The right of a licensor to revoke a license given by him is fully recognized by our court, as will appear from a mere cursory examination of the cases cited above. And, indeed, is fully recognized in the case of *Rhodes v. Otis*, 33 Ala. 578, upon which the defendant relies to support its contention of estoppel. Suffice it to say, that in that case a consideration was paid for the easement or license and the licensee or transferee put into possession of the land and water-way over which the rights to him were agreed to be granted. There was, therefore, no question of the operation of the statute of frauds, and, indeed, could not be. This being true, upon the plainest principles of equity, the licensor or seller should not have been permitted to retain the purchase money paid to him and to destroy the rights which he had sold to the other party. This is far from sustaining the doctrine contended for here.

In *Clanton v. Scruggs*, 95 Ala. 282, it is said: "The fact that one of the parties to such an agreement has acted on the faith of its validity does not raise up an estoppel against the other party to deny that it is binding on him. A mere breach of promise cannot constitute an estoppel *en pais*.—*Weaver v. Bell*, 87 Ala. 385." Continuing, on page 283, after quoting from *Weaver v. Bell*, *supra*, that "A representation relating to future action or conduct operates as an estoppel only when it has reference to the future relinquishment or

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subordination of an existing right, which it is made to induce, and by which the party to whom it was addressed was induced to act," the court said: "The representation there referred to does not include a mere promise to do or refrain from doing something in the future. * * * *Brigham v. Hicks*, 108 Mass. 246. Such a rule of estoppel would take the sting out of the statute of frauds, and defeat its manifest purpose." The case of *Brigham v. Hicks*, cited approvingly, is the one from which the quotation from Jones on Easements was taken.

It is clear that the decisions of this court are in harmony with the principles announced by us and with the text-writers from whom we have quoted at length. Smith, not being estopped, his conveyance of the land *ipso facto* was a revocation of the license to the defendant and the plaintiffs having acquired the legal title to the land and to the ditch were entitled to the immediate possession thereof and have a right to maintain this action and to recover such damages as they may have suffered by reason of the trespass committed by defendant.—*Davis v. Young*, 20 Ala. 151; *Boswell v. Carlisle*, 70 Ala. 244; *Dunlap v. Steele*, 80 Ala. 424; *Fields v. Williams*, 91 Ala. 502. And the jury may award exemplary damages if they see proper.—*Wilkinson v. Searcy*, 76 Ala. 181; *Allen v. Daniel*, 75 Ala. 408. "Whatever is done," says SHAW, J., in *Wills v. Noyes*, 12 Pick. 324, "willfully and purposely, if it be at the same time wrong and unlawful and known to the party, is in legal contemplation malicious."—*Lynd v. Pickett*, 82 Am. Dec. 89.

There is nothing in the facts which tends in the remotest degree to show that the plaintiffs ever renewed the license. On the contrary, they are shown to have asserted their rights under the revocation by demanding the payment of rent of defendant.

It is scarcely necessary to say that no damages for the negligent maintenance or operation of the ditch or dam are sought to be recovered in the complaint, and indeed, could not be under its averments.

Reversed and remanded.

[Walling v. Thomas *et al.*]**Walling v. Thomas *et al.****Bill in Equity for the Cancellation of a Deed.*

1. *Deed; cancellation for fraud or unfair advantage.*—Where by the practice of fraud upon or the taking of undue advantage of one who is infirm with age and mentally weak, a conveyance of land is obtained for a grossly inadequate consideration, the grantor in said deed or, upon the death of the grantor, the heirs can maintain a bill in equity to rescind said contract of sale and have the deed cancelled and set aside.
2. *Same; same; waiver of right.*—The right to rescind a contract of sale and to have the deed of conveyance cancelled may be waived by the party in whom the right resides, whether he be the party originally injured, or his successor in interest; and while such waiver may be implied from conduct inconsistent with the intention to rescind, as evidenced by long acquiescence in the transaction, the mere delay in instituting proceedings to avoid the deed, is subject to explanation showing that it was not caused by acquiescence in the sale.
3. *Rescission of contract; offer to do equity.*—While a bill for rescission must ordinarily offer to do equity by putting the party against whom the rescission is directed *in statu quo* or returning to him the consideration with interest, if such party has been reimbursed of his expenditure by what he has received under the contract sought to be rescinded, such offer to do equity is not necessary to authorize the maintenance of the bill.

APPEAL from the Chancery Court of Morgan.

Heard before the Hon. WILLIAM H. SIMPSON.

The bill in this case was filed on August 14, 1899, by the appellees, who were children and heirs of Sarah Thomas, deceased, against W. T. Walling, the appellant, and several other defendants who were described as the children, grandchildren and great great-grandchildren of Sarah Thomas, deceased. It was averred

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in the bill, as amended, that on June 12, 1890, Sarah Thomas executed a deed to W. T. Walling, conveying to him 200 acres of land at a recited consideration of \$500; that at the time of the execution of said deed, Sarah Thomas was weak physically and mentally; was very old and decrepid; that she was imposed upon by the defendant Walling, and through his paid agents; that said Walling induced one Echols, in whom Sarah Thomas had implied confidence, and who attended to all of her business affairs, to persuade said Sarah Thomas to execute a deed to this land for the sum of \$500; that Echols was paid by Walling to do this and in compliance with his employment, falsely represented to said Sarah Thomas that said lands were not worth more than \$500, and by reason of such false representation and of influence which he had over her, and the confidence which she had in him, he induced and persuaded her to execute said deed; that as a matter of fact the lands were very valuable and worth much more than the amount paid for them by Walling; that they were worth not less than \$2,000; that Sarah Thomas continued to remain under the dominion and influence of said Echols up to the date of her death, and from the date of the execution of said deed grew weaker in mind and body and finally became totally insane and was in this condition for some time before her death; that she died intestate on January 3, 1897; that after the purchase of said lands from Sarah Thomas, Walling went into possession thereof and so remained up to the time of the filing of the present bill; that the rental value of said lands was \$250 per year, and that he had the use and benefit of said lands from the date of the purchase to the time the bill was filed; that soon after the death of Sarah Thomas and continuously up to the time of the filing of the bill, the complainants asserted their rights to said lands and demanded of Walling that these rights be respected and satisfied; and that they be paid the fair value of said lands or that said Walling should convey them to the heirs of said Sarah Thomas; that said Walling acknowledged and conceded their rights and from time to time promised to adjust and settle their demands; that as a matter of fact he

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paid one of the heirs of said Sarah Thomas the value of his interest in said lands, and that during the intervening time from the death of Sarah Thomas up to within a few weeks from the filing of the bill, the said Walling gave the complainants reason to believe that an amicable and satisfactory adjustment and settlement of their demands would be made by him, but that no such settlement was made and a few weeks before the filing of the bill Walling declared the negotiations off, and, thereupon, the present bill was filed. It was averred in the bill as amended that the said Walling had received from the rents and profits of said lands more than the amount of the purchase money and interest, and the complainants averred that they were willing and agreed with said Walling to receive the full amount of the purchase money from the rents which he had already received and appropriated.

The prayer of the bill was that upon the final hearing the chancellor should decree that the right and title to said lands be in the complainant and the other heirs of Sarah Thomas, deceased, and that the deed from Sarah Thomas, deceased, to Walling be surrendered up and cancelled and held for naught; that the rental value of said lands since Walling had possession thereof should be ascertained, and that a decree be rendered against Walling in favor of the complainant and the other heirs of Sarah Thomas, deceased, for the full amount of the rents so determined, after deducting the \$500 paid by Walling as the consideration for said deed, and that a sale of the realty be had and a distribution of the proceeds thereof, together with the rents be had among the complainant and the other heirs of Sarah Thomas, deceased.

To the bill, as amended, the defendant Walling filed a demurrer, assigning many grounds, the substance of which was as follows: 1. It appears that Sarah Thomas, in her lifetime, after knowledge of the alleged fraud in procuring her conveyance, made no offer or attempt to rescind the contract by which she conveyed the lands; and that, therefore, the complainants have no right or interest in such lands and no right to have such

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conveyance set aside. 2. The bill as amended does not set out facts making a case of fraud on the part of Walling in procuring said conveyance made to him. 3. Because the demand as made is stale. 4. It appears from the bill as amended that the complainants have by their laches and lack of diligence lost any right they may have had to have had said conveyance set aside. 5. Because the complainants did not offer to do equity by offering to put said Walling in *statu quo*. 6. Because it was not shown that the demand was made by Walling for a rescission of said contract, and that he refused. 7. Because it is not averred that the complainants before filing their bill, tendered to Walling the money he had paid for the land. 8. Because the bill seeks to recover the rents and profits of the land and to have them divided without making the personal representatives of the decedent parties to the bill. The defendant also moved the court to dismiss the bill for the want of equity.

On the submission of the cause upon the demurrers and the motion to dismiss the bill for the want of equity, the chancellor rendered a decree overruling the demurrer and the motion. From this decree the respondent Walling appeals, and assigns the rendition thereof as error.

MARVIN WEST, for appellant.—A contract procured by the fraud of the vendee is, in equity, not void, but voidable at the option of the vendor.—2 Pomeroy's Equity Juris., § 915; *Johnson v. Johnson*, 5 Ala. 90, 101; *Samples v. Guyer*, 120 Ala. 615. It is to be treated as good until rescinded, and not as bad until confirmed.—Bispham's Equity (5th ed.), § 472, citing *Rigdon v. Walcott*, 31 N. E. Rep. 158. "Until avoided or rescinded the contract of sale remains in force, and title to the property passes to the vendee."—*Brown v. Pierce* (Mass.), 93 Am. Dec. 57, 60.

The facts averred in the present bill did not authorize the relief prayed for.—2 Pomeroy's Equity Juris. § 965; *Dent v. Long*, 90 Ala. 172; *Coleman v. Bank*, 115 Ala. 307; *Stephenson v. Allison*, 123 Ala. 446; *Samples v. Guyer*, 120 Ala. 610; *Henderson v. Boyett*, 126

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Ala. 172; *Howle v. Land Co.*, 95 Ala. 389; *Scruggs v. Decatur Land Co.*, 86 Ala. 173; *Sheffield L. Co. v. O'Neil*, 87 Ala. 158; *Goree v. Clemens*, 94 Ala. 337.

RUSSELL & LYNN, *contra*, cited 2 Story's Eq. Jur., § 1520; *Crocker v. Clements*, 23 Ala. 296; *Thomas v. Marshall*, 36 Ala. 504; *Kline v. Cutter*, 34 N. J. L., 329; *Springer v. Springer*, 2 U. S. Rep. 527; *R. R. Co. v. Kennedy*, 70 Ill. 350; *Young v. Arantz*, 86 Ala. 116; *Tindall v. Drake*, 51 Ala. 578-9; *Stevens v. Anderson*, 87 Ala. 228; *Glover v. Hill*, 85 Ala. 44; *Kennedy v. Marrast*, 46 Ala. 161, 167; *Campbell v. Kuhn*, 40 Am. Rep. 483.

SHARPE, J.—A conveyance of lands obtained for a grossly inadequate consideration by unfair advantage taken of great mental weakness, though not amounting to absolute incapacity, of the grantor, will in equity be set aside on equitable terms when application therefor is made seasonably by the grantor, his representatives or heirs.—*Waddell v. Lanier*, 62 Ala. 349; *Shipman v. Furniss*, 69 Ala. 562; *Burke v. Taylor*, 94 Ala. 530; *Allore v. Jewell*, 94 U. S. 506 (24 L. ed. 260); *Harding v. Handy*, 11 Wheat. (U. S.), 125; *Raymond v. Wathen*, 142 Ind. 367; 18 Ency. Pl. & Pr., 765, 771. In such cases the deed being voidable only and not wholly void passes title to the grantee, and the heirs' claim to relief rests not on legal succession to the title but on an equitable right to be invested with such succession. The relief appropriate to be afforded by the courts is by enforcing rescission of the contract of sale and cancellation of the deed.

The right to rescind may be waived by the party in whom it resides whether he be the one originally injured or his successor in interest, and such waiver may be implied from conduct inconsistent with an intention to exercise it including acquiescence in the transaction for an unreasonable length of time.—*Howle v. North Birmingham Land Co.*, 94 Ala. 389; *Lockwood v. Fitts*, 90 Ala. 150. But mere delay in taking steps to avoid the deed may be so explained as to show it was not an ac-

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quiescence. What will be considered a reasonable time for moving to disaffirm may depend on the situation and condition of the parties and the circumstances of the particular case.—*Orendorf v. Tallman*, 90 Ala. 441; 18 Ency. Pl. & Pr., 826.

The bill avers in substance that the deed it assails was obtained from complainants' ancestress while her mind was unsound, at about one-fourth the value of the land it conveys, and by means of the purchased influence of one in whom she was accustomed to repose trust and confidence; that thereafter she continued to decline to a state of total insanity lasting until her death. Taken as true as they must be on demurrer, these averments show a right lay in the grantor to have the sale avoided and they furthermore rebut all presumption that willing acquiescence was the cause of her failure to assert that right. Subjects of such infirmity merit protection from courts of equity so far at least as to be relieved from such presumptions, and the imputation of *laches* as well.

Complainants themselves waited before filing this bill about two years and eight months after the death of their ancestress. But it is averred that since then they have continuously asserted their rights in the lands by demands on defendant and that he made promises to pay for their claims on which they relied and were so caused to postpone legal proceedings. Delay so induced by defendant cannot fairly be attributed to acquiescence in its holding nor can it be accounted *laches*.

Equity will not assist one to repudiate a contract and retain its benefits. Hence a bill for rescission must ordinarily offer to do equity by restoring the party called on to rescind such consideration as he has paid with interest or other compensation for its use. But exception to this rule occurs where the defendant has been fully reimbursed for his expenditures by what he has received under the contract.—*Higby v. Whitaker*, 8 Ohio, 108; *Wilson v. Moriarty*, 77 Cal. 596; 18 Ency. Pl. & Pr., 834. The bill shows the use of the land during defendant's possession has been of value greater than the consideration he paid with interest and, therefore, an offer to return the consideration was not required to be

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alleged or made.

If there be persons who ought to be and are not made parties to the suit, that fact does not appear on the face of the bill, and, therefore, the objection is not a proper subject of demurrer.

The decree appealed from will be affirmed.

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Bill in Equity to foreclose Mortgage.

1. *Usury; how pleaded.*—When the defense of usury is interposed by plea or answer, the terms and nature of the alleged usurious agreement must be stated with clearness and definiteness; and the averments in the answer to a bill to foreclose a mortgage that "said note and mortgage is usurious and void for the interest, and respondent here plead the same," is wholly insufficient to present the issue of usury.
2. *Same; bona fide purchaser.*—Where one claims under a mortgage as a *bona fide* purchaser for value and without notice, and there is usury in the debt, the fact of usury may be shown without a plea of usury.
3. *Same; effect of usury as to bona fide purchaser.*—An agreement to pay usury upon a debt secured by a mortgage, so infects and taints the transaction as to preclude the mortgagee from being a *bona fide* purchaser without notice.

APPEAL from the Chancery Court of Tallapoosa.

Heard before the Hon. R. B. KELLY.

The bill in this case was filed by the appellee, Mrs. D. Jane Johnson, as guardian of her two daughters, Janie Burnett and Annie Mathis, who were Janie and Annie Johnson before they were married.

It was averred in the bill that on February 11, 1892, the complainant, as guardian of Janie and Annie Johnson, loaned one C. C. Clark the sum of \$432 out of the funds belonging to her wards' estate; that to secure this loan, C. C. Clark and his wife, M. A. Clark, executed to complainant this loan, which was evidenced by

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a note; executed to the complainant a mortgage upon certain specifically described lands; that this mortgage was duly recorded in the office of the judge of probate; that at the time of the execution of said mortgage C. C. Clark was in possession of the land conveyed therein, claiming to own it, and there was a deed on record showing that it had not been conveyed to any one else, or showing that any one else had any claim thereto; that at the time of making said loan and executing said loan and mortgage, said C. C. Clark represented to the complainant that he had a good and perfect title to said land, that it was unincumbered, and the loan was made and the mortgage accepted without any intimation that there was any claim or title to said land in any one else except said Clark; that since the execution of said mortgage and since the default in payment of the mortgage debt, the complainant had learned that one Orra Clark, the mother of C. C. Clark, claimed to be the owner of said land or a part thereof. It was then averred in the bill that the note had never been paid. C. C. Clark and his wife, M. A. Clark, and Orra Clark were made parties defendant to the bill; and the prayer of the bill was that said mortgage be foreclosed.

The defendant filed a joint answer, in which they denied that the complainant, as guardian of Janie and Annie Johnson, loaned to C. C. Clark the sum of \$432. In their answer they denied that C. C. Clark was in possession of lands described in the mortgage at the time of its execution, and also denied that he made any representations whatever to the complainant as to his ownership of said lands. It was then averred in said answer that at the time of the execution of said note and mortgage the respondent Orra Clark was in the open, notorious and exclusive possession of a portion of the lands conveyed in said mortgage, and had been so in possession of said lands, residing upon them continuously for more than thirty years; that said Clark was never in possession of said portion of the lands and was without authority to mortgage or convey the lands described in the mortgage.

It was then averred that C. C. Clark borrowed from

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the complainant the sum of \$265.50, and had never borrowed the amount expressed in the note.

The tenth paragraph of the answer was as follows: "10th. For further answer respondents charge and aver that said note and mortgage is usurious and void for the interest, and respondents here plead the same."

The evidence introduced by the complainant tended to prove the facts averred in her bill. J. W. Johnson, the son of the complainant, who negotiated the loan to C. C. Clark, testified that the complainant loaned \$300 in cash and let said Clark have a mule valued at \$100, and that interest on said \$400 at 8 per cent. was included in the note.

The evidence for the defendants tended to show that C. C. Clark only borrowed \$265.50 from the complainant; that at the time of the execution of the note and mortgage neither Clark nor his wife read the note or mortgage, but thought it was for the amount which they had borrowed, and did not know that it was for \$432; that the complainant charged 12½ per cent interest on said loan; that at the time of the execution of said mortgage C. C. Clark had no title to the lands conveyed therein; that the lands described in said mortgage had been owned and occupied by Alex. Clark, the father of C. C. Clark, and the father of Orra Clark; that in December, 1887, Alex. Clark conveyed said lands to C. C. Clark, and that subsequently in May, 1888, said C. C. Clark and M. A. Clark, his wife, executed a deed to Alex. Clark, conveying back to him said lands; that in May, 1889, Alex. Clark died; that at the time of his death Orra Clark was living upon said land, where she had lived with her husband for many years and was still in possession of said land at the time of the execution of the mortgage.

The defendants claimed to have made several payments upon said mortgage debt, and introduced evidence showing these payments, and also introduced in evidence the receipts which were given to C. C. Clark by J. W. Johnson, who was acting as the agent of the complainants. The other facts of the case are sufficiently stated in the opinion.

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On the final submission of the cause the chancellor held that the question of usury was not raised by the answer. The chancellor also held that the two items of credit claimed by the defendant Clark to have been paid to J. W. Johnson on the mortgage debt, to-wit, \$25 and \$23.15, were not paid upon the mortgage debt, but upon a different debt due by Clark to J. W. Johnson, individually.

Under the agreement of the parties a reference to the register was done away with, and the chancellor ascertained the amount due on the mortgage debt and decreed that the complainant was entitled to the relief prayed for and ordered the lands to be sold upon the payment of the amount so ascertained by him. From this decree the respondents appeal, and assign the rendition thereof as error.

THOS. L. BULGER and JAS. W. STROTHER, for appellant.—It is shown that the mortgage made to the complainant was usurious. A person claiming under a contract tainted with usury can not claim as an innocent purchaser.—*Smith v. Lehman*, 85 Ala. 394; *Meyer Bros. v. Cook*, 26 *Ib.* 417; *Wailes v. Couch*, 75 Ala. 134; *McCall v. Rogers*, 77 Ala. 349. And to make this defense available a special plea of usury is not necessary. *Wailes v. Couch*, 75 Ala. 134.

W. M. LACKEY, *contra*.

McCLELLAN, C. J.—We concur with the chancellor that the averment in the answer, “that said note and mortgage is usurious and void for the interest, and respondents here plead the same,” is wholly insufficient to present the issue of usury *vel non* to the end of defeating recovery of all interest.—*Munter v. Linn*, 61 Ala. 492; *Security Loan Asso. v. Lake*, 69 Ala. 456; *Woodall v. Kelly & Co.*, 85 Ala. 368; *Moses Bros. et al. v. Home Building & Loan Asso.*, 100 Ala. 465.

But where one party alleges and relies upon the status of a *bona fide* purchaser for value and without notice under a mortgage securing a debt and there is usury in the debt, the facts may be shown against such status

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without a plea of usury.—*Wailes & Co. v. Couch*, 75 Ala. 134. In this case it is clearly shown that the debt secured by the mortgage sought to be foreclosed was tainted with usury; and it follows that the complainant cannot claim as against the title of the heirs of Alex Clark, deceased, that she was a *bona fide* purchaser for value without notice.—*Southern Home Building & Loan Asso. v. Riddle*, 129 Ala. 562, and cases there cited.

The chancellor states in his opinion that there was no evidence that the deed from C. C. Clark and wife to Alex Clark was delivered. This is an inadvertence. Both C. C. Clark and Mrs. Orra Clark depose that this deed was delivered to the grantee at the time of its date, and there is no evidence to the contrary. The title to the land covered by this deed is either in Mrs. Orra Clark and any minor children of herself and Alex Clark there may have been at the time of the latter's death, under the homestead statute—in which case no interest in it passed under complainant's mortgage—or it was in the heirs of Alex Clark, one of whom was C. C. Clark, and only his individual interest passed by the mortgage to complainant.

There is also error in the decree appealed from, growing out of the disallowance of the items of twenty-five (\$25) dollars and twenty-three and 15-100 (\$23.15) dollars, shown by receipts "E" and "F" attached to the deposition of C. C. Clark, as credits on the mortgage debt. The evidence reasonably satisfies us that these payments were made by Clark and received by complainant's agent on the mortgage debt.

We do not consider the question whether this bill was well exhibited and prosecuted by Mrs. D. Jane Johnson as the guardian of her daughters. The point was not raised or suggested in any way in the chancery court, but, to the contrary, the respondents treated the bill throughout the proceedings in that court as being properly filed by her as such guardian, and they will not be allowed to make the objection to her competency for the first time in this court, no substantial rights of either side being dependent upon it.

The decree will be reversed, and the cause will be re-

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manded to the chancery court for further proceedings in accordance with this opinion.

Reversed and remanded.

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Statutory Action of Ejectment.

1. *Estates; when vested remainder created by will.*—Where a testator under his will devises land to his wife for life, which is "after her death to be equally divided between my [his] children which may then be surviving," the wife takes a life estate in the land and each of the children of the testator takes a vested remainder subject to be divested only by the survivorship of one or more of such children after the falling in of the life estate.
2. *Same; same; when purchaser from remainderman acquires title; ejectment.*—Where a testator devises his land to his wife for life which is, "after her death to be equally divided between my [his] children which may then be surviving," and the life tenant and each of the children of the testator executes a warranty deed to such land, the grantee in such deed acquires a fee simple title to said land; and the death of each of the children of the testator before the death of the life tenant does not give the heirs of the remaindermen the right to maintain an action of ejectment against the grantee in said deed.

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

This was a statutory action of ejectment brought by the appellants as children of James and Samuel Oliver, against the defendant, Jesse Dabney, to recover certain lands specifically described in the complaint. The cause was tried by the court without the intervention of a jury upon an agreed statement of facts, and the claim of the plaintiff and the defendant, respectively, are shown in the opinion. Upon such facts the court rendered judgment in favor of the defendant, to the rendition of which judgment the plaintiff duly excepted. The

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plaintiff appeals, and assigns as error the rendition of judgment for the defendant.

P. C. MASSIE, JENNINGS J. PIERCE and R. T. GOODWIN, for appellant.—The interest acquired by the children of Oliver under which will was divested by their death before the falling in of the precedent estate. Therefore, the deed of Oliver's children conveyed nothing, nor does it estop the heirs of Oliver, the plaintiffs in the present suit, from maintaining this action.—*Smaw v. Young*, 109 Ala. 528; *Upington v. Carrigan*, 37 L. R. A. 795; *Moore v. Little*, 41 N. Y. 66.

JOSEPH CALLOWAY and HILL & HILL, *contra*.

TYSON, J.—This is an action of ejectment brought by the children of James and Samuel Oliver to recover the tract of land described in the complaint. The father of James and Samuel, being the owner of this land, made a will in which he devised it to his wife for life and "after her death to be equally divided between my [his] children which may then be surviving." The testator left surviving him, in addition to James and Samuel, another son, John, and his wife, the life tenant, Susan. Each of the sons and the life tenant executed warranty deeds of bargain and sale to the land to one Dillard, who went into possession and afterwards sold it to the defendant. After the execution of these deeds, the sons died, leaving surviving them the life tenant, who also died a short time before the institution of this suit.

Before entering upon a discussion of the nature or character of the remainder to the children, it may be well to dispel any doubt that may exist as to the intention of the testator to expressly devise to his three sons *eo nomine* the fee in the land sued for. To do this, it is only necessary to call attention to the second item of the will, which reads as follows: "The other three-fourths of my negroes, I do hereby devise and bequeath unto my three children to-wit: Samuel C. Oliver, James McCarter Oliver and Knox Ponder [John R.] Oliver,

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to be equally divided between them, share and share alike to them and their heirs forever, *together with the foregoing bequest to their mother after her death.*"

Under the principles declared in *Thorington v. Hall* (111 Ala. 323), *Smau v. Young* (109 Ala. 528) and *Kumpe v. Coons* (63 Ala. 448), the wife took a life estate in the land and each of the children of the testator, the three sons, took a vested remainder subject to be divested. In the cases of *Thorington v. Hall* and *Smau v. Young*, there was a divestiture of the share or shares of those remaindermen who died before the life tenant since there was a surviving remainderman or men to take. In the case in hand, there is no surviving child or remainderman to take upon the termination of the life estate since all of them died before the life tenant. The event or contingency upon which the estate already vested, was to be divested, did not happen. Where this is the case, the rule is, that "an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted devise happen." Applying this rule of construction, "in *Harrison v. Forman*, where a fund was bequeathed to A. for life, and after her decease to P. and S. in equal moities; and in case of the death of either of them in the lifetime of A., then the whole to the survivor *living at her decease*. Both died in her lifetime; and Sir R. P. ARDEN, M. R., held that the original gift was not defeated. So, in *Sturgess v. Pearson*, it was held, that a gift to a person for life, and after his death to his three children, *or such of them as should be living at the time of his death*, conferred a vested interest on the children, subject to be divested only in favor of those who should be living at the prescribed period; so that if all the children died in the lifetime of the tenant for life, the shares of the whole devolved to their respective representatives. * * * So in *Belk v. Slack*, where a testator gave the residue of his real and personal estate to trustees, upon trust for A. for life, and after the decease of A. and B. he gave the same to C. and D. to be equally divided between them, share and share alike, or to the survivor or survivors of them. C. and D. both died in the lifetime of A. and B.; and it

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was held that their respective representatives were entitled to the several moities of the residue."—1 Jarman on Wills, *pp. 785, 786, top pp. 799, 800. See report of these cases in 5 Ves. 207; 4 Mad. 441, 1 Keene, 238.

In *Page v. May* (24 Beavan's Rep. 323), the testator bequeathed his reversionary interest in the 1000£ consols to his mother for her life and at her decease he gave and bequeathed them to his servant, Sarah Triggs, for life, "and after her decease he gave the said 1000£ to John, Edward and Samuel Page to be equally divided share and share alike or in case of the demise of each or either of them, to be divided between the survivors or survivor, or their representatives." The three legatees, John, Edward and Samuel, died in the lifetime of Sarah who survived the first life tenant, the mother. The court said: "The three legatees having died in the life of the tenant for life, the question is, whether this legacy took effect or went over. I am of opinion that it falls within the case of *Harrison v. Forman* [*supra*], and that class of cases. It is, in effect, an alternative bequest to them, and if one or two of them happened to die, and two or one of them survived the tenant for life, then the whole would go to the survivors or survivor, as the case might be. But the first bequest to the three was a vested gift, liable to be divested on the happening of a particular event, which did not occur, namely, of there being survivors or a survivor at the death of the tenant for life."

In *Littlejohn v. Household* (21 Beav. 29), the testator by his will devised a house to his three daughters, Catherine, Ann and Elizabeth, for life, and after their decease to his three grandchildren, Catherine, Christiana and William, their heirs and assigns, share and share alike; and he authorized his trustee to convey the house to his said grandchildren, their heirs and assigns, in such shares as aforesaid. And in the event of the death of either of his said grandchildren in the lifetime of his said daughters, then the testator desired that the share of them so dying should be transferred to the survivors, and if only one should be living, then to him or her so surviving. The court said: "I think

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there is not much difficulty on the face of the will. There is a plain gift for life in the first instance to the testator's daughters, and there is a clear vested remainder to the three grandchildren as tenants in common in fee, which cannot be taken away or divested except by express words. The words are [His Honor read the divesting clause.] Those being the words, the question is, in the first place, when is the transfer of the estate to take place? It can only take place after the death of the surviving tenant for life, that is, after the death of the surviving daughter of the testator. The same period must be the time for divesting the estate, in case it was divested. 'Surviving,' therefore, at the end of the clause, means surviving the last tenant for life. The case of *Cripps v. Wolcott*, therefore, clearly applies to this case, and this is made clear by the word 'transferred,' because there could be no transfer till after the death of the last tenant for life; and *Sturgiss v. Pearson* [*supra*] also applies, for in that case the gift was a vested interest subject to be divested in favour of survivors, but none survived, and, therefore, there was no divesting." See also 29 Am. & Eng. Ency. Law (1st ed), 467 and note 2.

This rule of construction has been fully recognized and enforced by this court in *Sherrod v. Sherrod*, 38 Ala. 537, *Drew v. Drew*, 66 Ala. 455, and *Grimball v. Patton*, 70 Ala. 626. The plaintiffs' father having a vested estate, which was never divested by the happening of the contingency of survivorship of one or more of them of the life tenant, their deeds operated to pass the fee to the defendant's grantor and, therefore, to preclude their recovery.

Affirmed.

[Andrews v. Meadow.]

Andrews v. Meadow.*Action upon a Bank Check.*

1. *Bill of exceptions; record must show that same was signed in term time or within the time fixed by court or by agreement of parties.*—Before a bill of exceptions can be considered a part of the transcript in a case on appeal, the record must affirmatively show that said bill of exceptions was signed in term time or in the time fixed by the court in term time, or by agreement of counsel as required by statute (Code, §§ 616, 617); and, the mere recital in the bill of exceptions that it was signed “within the time allowed by the orders of this court,” is not sufficient.
2. *Endorsement; right of accommodation endorser to maintain action against maker.*—Where an endorsement is made upon a negotiable instrument for the accommodation of the payee, such endorser, if compelled to pay, can maintain an action against the maker in the same way as if the instrument had been regularly endorsed by him, and he will accordingly be protected against defenses of which he was ignorant at the time of making the endorsement.
3. *Bank check included in bill of exchange.*—Bank checks are included in the words “bills” and “bills of exchange,” as used in the statutes of this State relating to commercial paper.

APPEAL from the Circuit Court of Bibb.

Tried before the Hon. JOHN MOORE.

This was an action brought by the appellant, F. H. Andrews, against the appellee, A. E. Meadow, and counted upon a bank check drawn by the defendant on the Blocton Savings Bank in favor of J. H. Schuyler & Sons, by whom, as alleged in the complaint, the said check was endorsed to the plaintiff. It was also alleged in the complaint that the check not being paid was duly protested, due notice of which was given to the defendant.

The defendant filed several pleas in which he set up a failure of consideration and averred in each of said pleas that said check was given for the purchase price

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of a dog sold to him by Schuyler & Sons, and that said Schuyler & Sons represented that the dog was sound, well trained and a good bird dog, upon which representation the purchase was made; but that as a matter of fact the dog was not well trained, was not sound, and was not a good bird dog. To these several pleas the plaintiff separately demurred upon the following grounds: 1. Said pleas do not aver that plaintiff had any knowledge or notice of the transaction between the defendant and the payee of the check. 2. Because said pleas do not aver that the plaintiff was a party to the transaction mentioned in each of said pleas. 3. Because said pleas fail to aver that the plaintiff knew anything about the representations made by the payee of said check to the defendant. 4. Said pleas seek to vary the contract of defendant entered into by him by his endorsements of the draft sued. These demurrers were overruled, to which ruling the plaintiff separately excepted. Thereupon the plaintiff filed two replications to the several pleas, in each of which it was averred that J. C. Schuyler & Sons requested the plaintiff to endorse the check drawn by the defendant on the Blocton Savings Bank, which is the subject of this suit. The plaintiff endorsed said check to enable Schuyler & Sons to obtain money thereon; that thereupon the check was cashed by the Loan & Savings Bank of Charlotte, N. C., and the money paid to said Schuyler & Sons; that the Loan & Savings Bank sent said check to the Blocton Savings Company and payment was there refused and said check was protested for non-payment and returned to the Loan & Savings Bank, and the Loan & Savings Bank required the plaintiff as endorser to pay to it the amount of said check and the protest fee.

It was then further averred in each of said pleas that at the time the plaintiff endorsed said check and became bound for the payment of the same, he knew nothing of the trade between the defendant and Schuyler & Sons; that he knew nothing of the representations made to the defendant, and that he knew of no defense whatever to said check. The defendant demurred to these replications upon the following grounds: "1st. Because said replications show that the matters alleged therein

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are no answer to the pleas filed in this cause by defendant. 2d. Because the matters set forth in said replications show that the plaintiff in this cause was not a *bona fide* purchaser of said check for value without notice upon maturity. 3d. Because said replications fail to show that the plaintiff in said cause was a *bona fide* purchaser of said check sued upon for valuable consideration and without notice. 4th. Because said replication fails to show or allege that said check sued upon was purchased by the plaintiff in due course of trade for a valuable consideration and without notice and before maturity." This demurrer was sustained, and to this ruling the plaintiff duly excepted.

Upon issue joined upon the pleas, there were verdict and judgment for the defendant. Under the opinion on the present appeal it is unnecessary to set out in detail the facts of the case and the rulings upon the evidence as shown in the bill of exceptions.

The trial was had on July 16, 1900, and the bill of exceptions as contained in the record purports to have been signed on January 2, 1901, and to have been filed January 8, 1901. Just preceding the signature of the judge to the bill of exceptions there is contained in the recital that it was signed "within the time allowed by the orders of this court."

After judgment was rendered, there was a motion for a new trial, and on July 21, 1900, the motion was continued to the fall term of the court, and on November 3, 1900, the court refused to grant said motion for a new trial. The only entry in the record relating to the time of the filing of the bill of exceptions was the order of the court made on January 2, 1901, which order was in words and figures as follows: "On the application of the plaintiff, the time heretofore given him within which to file a bill of exceptions is hereby extended twenty days."

ELLISON & THOMPSON for appellant, cited *First Nat. Bank v. Nelson*, 105 Ala. 180; *Morris v. Eufaula Nat. Bank*, 122 Ala. 580; *Sheahan v. Davis*, 28 L. R. A. 477; 2 Randolph on Com. Paper, § 692; *Barker v. Parker*, 10

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Gray 339; *Ala. Nat. Bank v. Rivers*, 116 Ala. 1, 12, 13; *Milton v. DeYampert*, 3 Ala. 652.

HOGUE, LAVENDER & FULLER, *contra*, cited *Chambers v. Falkner*, 65 Ala. 448; *Glasscock v. Smith*, 25 Ala. 474; *Ross v. Drinkard*, 34 Ala. 434.

SHARPE, J.—We preface with the statement that the sufficiency of the pleading will be passed on only so far as the same is questioned by specific objections and that the assignment of error based on exceptions cannot be considered for the reason that the bill of exceptions does not purport to have been signed as required by section 616 of the Code, within the term at which they were taken, or thereafter by any order or agreement extending time for signing. If the pleas set up defenses good to defeat the plaintiff in case he knew of or was a party to the transaction in which the instrument in suit originated, they were sufficient to devolve on the plaintiff the necessity of replying his ignorance of those defenses at the time he became an indorser. That the pleas did not affirm plaintiff had notice of or participated in the original transaction was not ground for demurrer.

The demurrers to the replications should have been overruled. In respect of rights as well as liabilities, an accommodation indorser of negotiable paper is in a situation analogous to that occupied by those who indorse in the regular course of its transfer from one holder to another. If compelled to pay it in whole or in part he may maintain an action against the maker for the amount paid—*Perry v. Tuscaloosa, etc., Co.*, 85 Ala. 158. This is so whether the indorsement be for the accommodation of the payee or maker. It is true one may not make another his debtor without the other's consent and, therefore, a recovery against the maker cannot be founded on an indorsement made officiously or at request of a stranger to the instrument. A decision to that effect was rendered in *Willis v. Hobson*, 37 Maine, 403. But in view of usages recognized and sanctioned by commercial law, indorsements made for the payee's accommodation are held to have been impliedly invited

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by the maker, and one who for such purpose and in good faith indorses negotiable paper which the payee also indorses, may if compelled to pay, maintain an action against the maker upon the same rights he could have asserted had the instrument been indorsed to him regularly, and will accordingly be protected as against defenses of which he was ignorant when indorsing. The theory upon which a suit proceeds is stated in *Breckenridge v. Lewis*, reported in 84 Maine, 349, and in 30 Am. St. Rep. 353. The plaintiff in that suit indorsed the defendant's promissory note for the accommodation of the payee who then negotiated the same, and when it fell due the plaintiff paid it, and afterwards sued to recover from the defendant the amount of the note. It was denied that plaintiff was a *bona fide* holder of the note so as to shut out equitable defenses. The court held that position untenable, saying: "When the plaintiff indorsed the note for the accommodation of the payee, he became liable thereon, subject to mercantile usage, and held the same relation to the maker as if he had discounted the note himself, instead of indorsing it. The payee received the money on the note from the holder, to whom the plaintiff became contingently liable for its payment; and when the plaintiff became absolutely liable to pay the note, and did pay it, the promise of the maker, negotiable in form, transferred by the payee's indorsement, ran to him; and it could make no difference to the maker by what means or for what consideration the plaintiff gained title to the note. He then held it with the same rights in regard to it as if he had given the payee the money on the note, instead of an accommodation indorsement that afterwards compelled the payment of money, or an equivalent agreed to between him and the holder, to whom it had been negotiated." A similar decision upon like principles was made in *Sheahan v. Davis*, reported in 27 Oregon, 278, in 28 L. R. A. and in 50 Am. St. Rep. 722. In *Laubach v. Pursell*, 35 N. J. Law Rep. 434 and in *Beckwith v. Webber*, 78 Mich. 390, the same principles ruled. We regard these decisions as sound and as authority applicable to the present case, for within the meaning of our

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statutes specifying what instruments are governed by commercial law a bank check is in effect a bill of exchange.—*First Nat. Bank v. Nelson*, 105 Ala. 180; *Morris v. Eufaula Nat. Bank*, 122 Ala. 580.

Reversed and remanded.

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*Action by Passenger against Common Carrier for
Ejection from Train.*

1. *Pleading and practice; when ruling upon demurrer without injury.*—Where a special plea sets up no matter in defense which is not available under the plea of the general issue, and amounts to nothing more than a denial of the plaintiff's cause of action, if error occurs in sustaining a demurrer to such plea, it is error without injury.
2. *Same; insufficient pleas.*—In an action by a passenger against a railroad company to recover damages for the alleged wrongful ejection of plaintiff from the defendant's train, several pleas seeking to set up a defense to the action, which do not deny the allegations of the complaint and are not good as pleas in confession and avoidance, are insufficient and subject to demurrer.
3. *Bill of exceptions; will not be considered when not signed by judge.*—A bill of exceptions which was never signed by the presiding judge, and is not established as provided by statute, will not be considered in the review of the case by the Supreme Court, although there was an agreement of counsel that the same should be considered and treated as a bill of exceptions in said cause; such agreement being entered into by reason of the judge who presided in said cause having died before the bill of exceptions was prepared.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

This was an action brought by the appellee against the appellants. The complaint contained three counts. The first count of the complaint was as follows: "The

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plaintiff claims of the said defendants, one thousand dollars, damages, because the said defendant was on and prior to April 16th, 1898, engaged in the business of a common carrier and a carrier of passengers, between Elero, Tennessee, and Huntsville, Alabama, and as such was running trains propelled by steam to and from Elero, Tennessee, to Huntsville, Alabama, upon its railroad known as the Nashville, Chattanooga & St. Louis Railroad, a part of which runs through Madison county, Alabama, and on and prior to said 16th day of April, 1898, the said defendant had been and was accustomed to run from said Elero, Tennessee, to Huntsville, Alabama, a certain train composed in part of cars for carrying freight and in part of cars for carrying people, or passenger coaches, it had been and was accustomed to carry passengers for hire between said points, and which said train reached New Market, a station between said points in Madison county, Alabama, on said day at about 9 o'clock A. M., and on said day plaintiff purchased from the ticket agent of defendant, one Lansden, a ticket from said station at New Market to Huntsville, Alabama, for which he paid fifty-five cents, the amount demanded therefor by said agent, and bought said ticket for the purpose of becoming a passenger and going on said train from New Market to Huntsville, Alabama, and said ticket was so sold to plaintiff by said agent, who assured him that he (plaintiff) could become a passenger and make said trip on said train, and plaintiff waited at said station from about a quarter to nine o'clock, when he purchased said ticket, about 9 o'clock A. M., when said train arrived at said station of New Market, and was assured by said agent, in the mean time that he could make such trip on said train, and at 9 o'clock said train arrived, and plaintiff having said ticket got upon and into one of the passenger coaches thereof, which was open and in order and proper condition for the reception of passengers, and before said train left New Market, the conductor, one Tobe Smith, although plaintiff had showed him his ticket which was in all respects legal and entitled him to passage and made him aware of the assurances given him (plaintiff) by the ticket agent

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that he could ride on said train, unlawfully, wrongfully, wantonly and without regard to the rights of plaintiff, refused to allow him to ride on said train, and required him to leave said train and told him if he did not do so he would put plaintiff off by force, and plaintiff was against his will forced to leave said train and was laughed at by the conductor and brakeman and the agent, and thereby treated with indignity, and was greatly inconvenienced as he was unable to reach Huntsville in time to take the west-bound train for Memphis, where he had an important business engagement, which he was thereby prevented from filling, and lost the entire day in waiting for said train, and was forced to buy another ticket, the time within which the first one was good having expired before a train arrived at New Market on which he was permitted to travel, to plaintiff's damage one thousand dollars, hence this suit."

The defendant demurred to the complaint, and to each count thereof, upon the following grounds: 1. That there is not shown in the complaint a cause of action against the defendant, in that said complaint fails to aver that the ticket which was purchased by the plaintiff entitled him to ride on the train which he attempted to board. 2. Said counts of the complaint fail to aver that the train upon which the plaintiff endeavored to ride was for the purpose of carrying passengers at the time plaintiff offered to ride thereon. This demurrer was overruled. Thereupon the defendant pleaded the general issue and the following special pleas: "2. That on the 16th day of April, 1898, the day on which the plaintiff endeavored to get transportation on the train named in the complaint, said train was not being run for the transportation of passengers, but only for the transportation of freight, and the plaintiff had no right to ride thereon." "3. The passenger coach upon which the plaintiff endeavored to ride upon the ticket purchased by him, was at the time being transported in connection with a freight train, but not for the transportation of passengers, and there was at the time said plaintiff endeavored to board said train a rule of the defendant company, in existence and in force that no passen-

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gers should be carried upon said train, and the conductor in refusing to permit the plaintiff to travel thereon was acting within the scope of the said rule." "4. At the time the plaintiff endeavored to ride upon the train of the defendant, the conductor had no knowledge of the alleged statements made by the agent of the defendant to the plaintiff, and the said train was being run for the transportation of the freight alone, and the said conductor in refusing to permit the plaintiff to ride thereon was acting within the scope of a rule of defendant company, which prohibited passengers from riding upon said train." "5th. The ticket purchased by the plaintiff was an unlimited ticket, and was good for passage until it was used, and if any loss occurred on account of the purchase of said ticket, it was because the plaintiff failed to present it to the defendant for passage on the train on which he came to Huntsville, and if so presented it would have been good for his said passage, or on any passenger train."

To these pleas the plaintiff demurred upon the following grounds: 1. They each fail to deny that it had been the custom of the defendant to carry passengers upon said train upon which the plaintiff was refused passage. 2. Said pleas each fail to deny that defendant's agent sold plaintiff the ticket for the purpose of taking passage on said train upon which he was denied passage.

To the fifth plea the plaintiff demurred severally upon the ground that whether the ticket was presented or not would not affect plaintiff's right to recover, but merely cause to show whether the value of the ticket was lost to plaintiff or not. These demurrers were sustained.

The cause was tried upon issue joined upon the plea of the general issue. The bill of exceptions in this case was not signed by the judge who tried the cause, but at the end of the bill of exceptions there was the following agreement of counsel, which was signed by counsel for the defendant and the plaintiff within the time allowed by the order of the court for preparing and having signed a bill of exceptions in said cause: "The Hon.

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H. C. SPEAKE, the judge who tried this case having died before the bill of exceptions was signed, it is hereby agreed by and between the parties by their attorneys of record, that the foregoing pages, purporting to be a bill of exceptions, is a correct bill of exceptions in this cause, and shows all matters occurring in the trial not otherwise appearing of record, and it is further agreed that this bill of exceptions shall be filed by the clerk of the circuit court of Madison county, and shall become a part of the record in this case, and shall be entered in the record for the Supreme Court as a part thereof and shall be received by the Supreme Court as the true bill of exceptions in the case, as if the same had been established in the Supreme Court as provided by law."

There was judgment in favor of the plaintiff, assessing his damages at \$50. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

OSCAR HUNDLEY, for appellant, cited *McGhee v. Reynolds*, 117 Ala. 413; *McGhee v. Cashin*, 130 Ala. 561; *L. & N. R. R. Co. v. Hine*, 121 Ala. 234; *Johnson v. Railroad Corporation*, 46 N. H. 213.

S. S. PLEASANTS and DOUGLASS TAYLOR, *contra*.—It is undoubtedly the law that, generally speaking, a railroad company has the right to refuse to carry passengers upon its freight trains, but where a company is accustomed to carry passengers upon such trains, its duties to receive and carry such persons as offer themselves, are of the same character as in the case of its regular passenger trains.—*Chicago, etc. R. R. Co. v. Flag*, 92 Am. Dec. 133; *Edgerton v. N. Y. & Harlem R. R.*, 39 N. Y. 227; 5 Am. & Eng. Enc. of Law (2d ed.), 540. And even if the company has not been accustomed to carry passengers on its freight trains, if the ticket agent sells a person a ticket and assures him he can ride on such train, though there may be a regulation of the company prohibiting such travel, this will impose upon the company the customary liabilities of carriers of passengers.—*Dunn v. Grand Trunk Ry.*, 4 Am. Rep. 267; *Lake Shore & M. S. R. Co. v. Brown*, 14 N. E. 197;

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s. c. 123 Ill. 162; 5 Am. & Eng. Enc. of Law (2d ed.), 540.

DOWDELL, J.—The complaint alleges a wrongful ejection of the plaintiff from the defendant's train by the conductor, and upon which the plaintiff had purchased a ticket to ride. The damages claimed are based upon the wrongful act, and the action is clearly one in tort.

The assignment of error based on the ruling of the court on the defendant's demurrer to the complaint is not insisted on in argument. Moreover, we think the complaint states sufficiently the cause of action, and the demurrer was without merit.

The defendant filed five pleas, the first being the general issue. Demurrers were sustained to the 2d, 3d, 4th and 5th pleas, and this action of the court constitutes appellant's second assignment of error on the record. The second plea, to which demurrer was sustained amounted to nothing more than a denial of the plaintiff's right on the train. It set up no matter in defense of the act, which was not available under the plea of the general issue. Every benefit the defendant could possibly have under this plea was likewise open to it under the plea of the general issue. So if there was error in sustaining the demurrer to the plea, it was clearly error without injury. See *L. & N. R. R. Co. v. Hall*, 131 Ala. 161, and authorities there cited.

The 3d, 4th and 5th pleas are manifestly bad. They are not good as pleas in confession and avoidance, nor do they, or either of them, deny the allegations of the complaint. The court properly sustained the demurrers to these pleas.

The remaining assignments of error are based upon matters arising in what appears in the transcript, and was intended, to be a bill of exceptions. That which in the transcript purports to be a bill was never signed by the presiding judge. It is attempted to be made a part of the record, as a bill of exceptions, by the agreement of counsel. This cannot be done. This subject is controlled by the statute. The statute provides in cases of failure or refusal of the judge to sign a bill of exceptions, how the same may be established. Unless

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the bill of exceptions becomes a part of the record pursuant to the requirements of the statute, it cannot be looked to or considered for any purpose. Such being the case there is nothing to support these assignments.

We find no error in the record, and the judgment must be affirmed.

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Petition for Intervention.

1. *Petition for intervention; right to maintain same can be waived.*—Although a person who is not a party to a pending suit in equity has originally no right to intervene in said cause for any purpose, yet the parties to that cause can waive their objections to such intervention, and when this is done, the equity set up by the intervenor can be litigated and determined as a part of the suit already pending.
2. *Same; same; case at bar.*—Where a person who is not a party to a pending suit files a petition for intervention and complainant in the original bill answers said petition admitting all of its averments and the respondent to the original bill answers said petition and incorporated in his answer a demurrer which did not challenge the petitioner's right to come into the case, and some months later said respondent moves to dismiss the petition, but not on the ground that the petitioner had no right to file it in said cause, and such demurrer and motion are passed upon, such acts constitute a waiver by the parties to the original suit of any objection to the petitioner's right to intervene therein; and where, after such rulings are made for more than a year after the intervention is filed, the defendant in the pending suit moves to strike the petition for the intervention from the file upon the ground that he has no right to intervene, such motion comes too late.
3. *Right of redemption; junior mortgagee.*—A prior mortgagee in attempting a foreclosure of a mortgage under the power of sale contained therein, purchased at said sale without authority being given him in the mortgage to so purchase. The junior mortgagee within two weeks after said unauthorized purchase disaffirmed said sale and tendered to the prior

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mortgagee the amount paid by him, together with interest and all lawful charges and asked to be allowed to redeem. This tender was refused and the prior mortgagee declined to allow the junior mortgagee to redeem. *Held*: Such facts present a case of seasonable disaffirmance of the sale and purchase by the prior mortgagee, and entitles the junior mortgagee to redeem the property conveyed in the mortgage.

APPEAL from the Chancery Court of Bibb.

Heard before the Hon. THOS. H. SMITH.

On June 1, 1897, Sarah E. Nabors, as administratrix and E. S. Lyman, as administrator, of the estate of French Nabors, deceased, filed an original bill in the chancery court of Bibb county, against Charles F. Douthit. It was averred in this bill that on April 21, 1890, Mrs. Amelia Hoskins and John Erharker, executed a mortgage upon certain property to Charles F. Douthit to secure the payment of certain promissory notes; that on June 9, 1891, after the execution of said mortgage, the said Amelia Hoskins and John Erharker conveyed the land included in said mortgage to French Nabors, which property was conveyed subject to said mortgage; that on February 8, 1896, under the power contained in said mortgage, the said Charles F. Douthit sold the property conveyed in said mortgage and became the purchaser thereof, but that no power was given to said Douthit as mortgagee to purchase at his own sale. It was then averred that after the death of said French Nabors, the complainants, as his personal representatives, had disaffirmed said sale, and had offered to pay to said Douthit the amount which he had paid, together with interest and all other lawful charges, but that said Douthit had refused to accept said amount so tendered and declined to allow the complainants to redeem said property.

The prayer of the bill was that the complainants be allowed to redeem and that pending said suit a receiver be appointed of the property conveyed in the mortgage.

On March 9, 1898, Frank Nelson, Jr., filed his petition in the chancery court of Shelby county, asking to be allowed to intervene in said cause then pending. It was averred in said petition in addition to

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the facts averred in the original bill, that after the mortgage was executed by Amelia Hoskins and John Erharker to Charles F. Douthit, and after Amelia Hoskins and John Erharker transferred the property included in the mortgage to French Nabors, the said French Nabors and his wife, on November 29, 1893, executed to petitioner, Frank Nelson, Jr., a mortgage on said property to secure an indebtedness due from said French Nabors to the petitioner. It was then averred in said petition that the petitioner, Frank Nelson, Jr., had disaffirmed the sale made by Douthit under the mortgage executed to him and had tendered to said Douthit the amount paid by him on said mortgage indebtedness, together with interest and all lawful charges, but that said Douthit had refused to accept said amount, and had refused to permit the petitioner to redeem said property.

The prayer of the petition was that the said Frank Nelson, Jr., be made a party to said suit and that upon the final hearing of the cause a decree be rendered declaring the sale made by said Douthit null and void so far as the petitioner was concerned, that the amount due said Douthit upon the mortgage debt be ascertained, and that upon the petition, as junior mortgagee, paying the amount so ascertained to said Douthit, he be permitted to redeem said property from under said mortgage. The other facts of the case are sufficiently stated in the opinion.

On the final submission of the cause on the pleadings and proof, the chancellor rendered a decree granting the relief prayed for by Frank Nelson, Jr., in his petition, effectuating Nelson's equity of redemption.

The respondent Douthit prosecutes the present appeal, and assigns as error the decree of the chancellor overruling his motion to strike the petition of Frank Nelson for intervention from the file, and also the final decree granting the relief prayed by the petitioner.

LOGAN & VANDEGRAAF and A. LATADY, for appellant, cited *McCall v. Most*, 89 Ala. 487; *Powers v. Andrews*, 84 Ala. 289; *Seals v. Phieffer*, 77 Ala. 278; *Vick v. Beverly*, 112 Ala. 458; *Beatty v. Brown*, 101 Ala. 695; *Leh-*

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man v. Moore, 93 Ala. 186; *Beebe v. Buxton*, 99 Ala. 117; *Brewer v. Hollinger*, 88 Ala. 405; *Paulling v. Meade*, 23 Ala. 505; *Carlin v. Jones*, 55 Ala. 674; *Ex parte Printup*, 87 Ala. 148; *Renfro Bros. v. Goetter*, 78 Ala. 311; *Ward v. Ward*, 95 Ala. 311.

W. S. CARY, BROWN & LEEPER and KNOX, BOWIE & BLACKMON, *contra*.—No formal order making parties or allowing an intervention to be filed is necessary. Where the intervenor comes in and is treated as a party he has all the rights as one who has been regularly and properly made a party.—*French v. Lapen*, 105 U. S. 509, 524; *Ex parte Cutting*, 94 U. S. 14; *Mayers v. Fenn*, 5 Wall. 205; *Ware v. Curry*, 67 Ala. 274; *Robinson v. Robinson*, 44 Ala. 227; *Seggett v. Bennett*, 48 Ala. 380; *Norwood v. M. & C. R. R. Co.*, 75 Ala. 563; *Herman v. Pfister*, 2 La. 456; *Donner v. Palmer*, 51 Cal. 629; 16 Am. Dec. 181.

McCLELLAN, C. J.—The pleading of Frank Nelson whereby he sought to intervene and be made a party to the pending suit of the personal representatives of French Nabors, deceased, against Charles F. Douthit is indifferently called a “petition” and a “bill” in the case. It is of little moment whether it was the one or the other, since, whether it was a bill or a petition, we shall assume for the purposes of this appeal that Nelson had originally no right to file it in the cause mentioned and had no right to intervene in that cause for any purpose. Yet the parties to that cause had the right and power to waive their objections to his thus coming into the case, to admit and receive him as a party to it and to litigate the equity set up in his bill and to have it determined in and as a part of the suit already pending. And this they unquestionably did. The complainants in the original bill upon the filing of this bill or petition by Nelson at once answered it, admitting all its averments. And Douthit, the respondent to the original bill, soon afterwards also answered it, incorporating in his answer a demurrer which did not challenge Nelson’s right to thus come into the case, but to the contrary assumed the right on his part to have the case

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made by his petition entertained and determined in this litigation and challenged the sufficiency of his petition to present his alleged abstract equity. And some months later Douthit moved to dismiss Nelson's bill or petition, not because he had no right to file it in the cause, but on the ground that its averments made no case for the equitable relief he sought. This motion was made on September 8th, 1898. On that day there was a submission upon it and on Douthit's demurrer to the petition for intervention, and both the motion and the demurrer were overruled. Some months after this, viz., on March 9th, 1899, after Nelson had been recognized as a party to the cause in the way we have indicated for a year, and after the evidence had all been taken, and when the cause was ready for submission for final decree upon the alleged rights of said Nelson set up in his petition or bill for intervention, the respondent Douthit for the first time objected to Nelson's coming into, or rather, being in the cause as a party, and filed a motion "to strike the petition of the said Frank Nelson for the intervention from the the file for the reason that if he has any rights as stated in said petition, he can only assert them by independent bill and not by petition as he undertakes in this case, and because there is no fund in this cause being administered by the court in which the said petitioner is interested." In or opinion this motion came too late, and the chancery court properly proceeded to the adjudication of Nelson's rights just as if he had propounded them in the original bill.—*Gibson v. Troubridge Furniture Co.*, 96 Ala. 357; *Smith v. Alexander*, 87 Ala. 387.

This petition or bill exhibited by Nelson showed that he held the equity of redemption in the property mortgaged by Erharker *et al.* to Douthit, that Douthit in attempting a foreclosure of that mortgage had purchased at the sale under the power therein contained, that said Douthit had no authority to purchase at said sale, that, of consequence Nelson had a right to disaffirm said transaction at any time within two years, and thereupon to treat the mortgage to Douthit as still subsisting and to redeem the land by paying the mortgage debt, etc. That within two years after the said sale

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Nelson did disaffirm said attempted foreclosure and made a tender to Douthit of the sum necessary for redemption, that the tender was not accepted, that the petitioner has ever since been ready to pay off the mortgage, etc., etc., and the petitioner offers now to pay it off, and to do equity, etc., etc. These facts presented a case of seasonable disaffirmance of the sale and purchase by Douthit, the declaration of disaffirmance accompanied by a tender for redemption having been made within two years from the sale; and for a decree of redemption by the chancery court.—*Ezzell v. Watson*, 83 Ala. 120, 123; and the demurrer and motion to dismiss interposed by the respondent Douthit were properly overruled.

The case thus made for Nelson was supported by the evidence. It is made to clearly appear that he seasonably announced to Douthit his election to disaffirm the sale and purchase by the latter and to redeem from the mortgage held by him, and that this declaration was accompanied by what was in legal effect a tender of the amount of money due to Douthit and claimed by him under the mortgage. Douthit denied his right to redeem and declined to accept the tender. His right to redeem at that time as junior mortgagee was undoubted. On this state of averment and proof, the chancery court was entirely justified in the decree rendered, effectuating Nelson's equity of redemption.

The evidence relied on before the chancellor to support the exception of respondent to the register's report was noted in the exception by reference to certain pages of the written testimony then before the court. The paging thus used in reference is not preserved in the transcript before us; and it is not practicable for us to review the conclusion of the chancellor since we are not certainly advised as to the evidence upon which his conclusion was reached. Taking the statement made in the exception as indicating what the evidence was, we are not prepared to say that the report of the register is plainly and palpably erroneous.—*Speakman v. Burleson*, 123 Ala. 678, 682.

The decree of the chancery court must be affirmed.

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SHARPE, J., dissenting.—As I understand the doctrine announced in *Harris v. Miller*, 71 Ala. 26; *Cooper v. Hornsby*, *Ib.* 62; *Thomas v. Jones*, 84 Ala. 302; *McCall v. Mash*, 89 Ala. 487, and kindred cases, the disaffirmance treated of in the majority opinion can be made only through a court of chancery and *laches* will be imputed to him who seeks to avoid the sale if he thereafter waits longer than two years to sue. The sale binds the purchasing mortgagee, entitles him to possession and extinguishes the debt to the amount of his bid. It cuts off the equity of redemption and at law leaves its owner only the statutory right to redeem.—*Childress v. Monette*, 54 Ala. 317, and authorities *supra*. His right to disaffirm springs from a doctrine recognized and applied alone in courts of equity which hold the power to sell as a trust, and an authorized purchase by the trustee at his own sale as presumptively unfair and a fraud on the rights of the mortgagor. In my opinion there is no principle, either legal or equitable, which empowers the mortgagor or his vendee by his mere personal election and tender, to revive, and continue indefinitely the equity of redemption. Therefore, I do not concur in this decision.

DOWDELL, J., concurs in the dissenting opinion.

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Bill in Equity to enjoin Public Nuisance.

1. *Public nuisance; encroachment upon sidewalk in the erection of a building will be enjoined.*—The encroachment upon a sidewalk in a city by the erection thereon of columns in front of a building adjacent to the said sidewalk, constitutes a public nuisance for the abatement of which, or to enjoin the erection and maintenance of which, a bill in equity can be maintained.
2. *Same; when bill can be maintained by private citizen.*—A private citizen who sustains an injury in the erection and maintenance of a public nuisance, different in degree and

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kind from that suffered by the general public, can maintain a bill in equity to enjoin the erection and maintenance of such public nuisance.

3. *Easement of view a valuable right and can be preserved.*—An easement of view or prospect from every part of a public street is, like light and air, a valuable right of which the owner of a building abutting on a street can not be deprived by an encroachment upon the street by a coterminous or adjacent proprietor; and to enjoin the erection and maintenance of a building which would obstruct the enjoyment of such right, the owner of a building can maintain a bill in equity.
4. *Same; municipal authorities can not grant the right to maintain public nuisance.*—The authorities of a municipality have no power to authorize the encroachment upon a sidewalk by the erection and maintenance thereon of a part of a building; and it is not a condition precedent to the maintenance of a bill to enjoin the erection and maintenance of such obstruction, that the complainant, who owned the adjacent or coterminous building had applied, without success, to the authorities of the city for relief.
5. *Public nuisance; fact that complainant is guilty of obstructing sidewalk no reason why he can not maintain bill to abate public nuisance.*—It is no defense to a bill, filed to enjoin the erection and maintenance of an obstruction upon a sidewalk adjacent to the complainant's property, that the building owned by the complainant itself encroaches upon said sidewalk.
6. *Bill to enjoin public nuisance; when plea bad for duplicity.* Where a bill is filed to enjoin the erection and maintenance of a part of a building which encroaches upon a sidewalk in a city, upon the ground that it was a public nuisance and obstructed the complainant's enjoyment of light, air and view, a plea which sets up that the complainant who owned the adjacent building consented to the encroachment upon the sidewalk, and which further sets up as a defense that the complainant was not entitled to have the light, air and view come to his building from that part of the street in front of defendant's building, to which the defendant has a fee, is bad for duplicity.

APPEAL from the City Court of Montgomery, in Equity.

Heard before the Hon. A. D. SAYRE.

The bill in this case was filed on July 20, 1901, by

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the appellee, A. P. Tyson, against the First National Bank of Montgomery. The bill averred in substance as follows: 1. Complainant was a resident citizen property owner, and tax payer in the city of Montgomery. 2. The defendant bank was organized under the laws of the United States, and located in said city. 3. Commerce street, in said city, was dedicated to and accepted by the public more than 50 years ago, and was used by the public for street purposes; that it was laid out of uniform width for its entire length between the building lines, and built up on both sides with business houses, all of which, with two exceptions, extending to the building line only or receding therefrom. 4. Complainant owns a three-story brick building on the east side of the street, known as number 12 Commerce street, used as a bank and office building, and extending up to the building line of the street, but not encroaching thereon. 5. The defendant bank owned a lot on the same side of the street, known as number 14 Commerce street, immediately adjoining complainant's lot and building, upon which the bank was constructing a six-story brick and stone building. 6. The bank intended to place in front of its building four stone columns, as ornaments, to extend from the sidewalk, 16 feet in height, and 2 feet, more or less, beyond the established building line into the street; that the bases for these columns had already been laid and the columns cut; that complainant had protested against said encroachment on the highway, but, notwithstanding, the said bank intended to place said columns in front of its building. Upon advice of counsel, complainant averred that the said encroachment upon the highway is a public nuisance, and if completed and placed in position as contemplated "said encroachment will greatly damage your orator beyond that which is common to the public generally by injuring and depreciating the value of your orator's property and by destroying the symmetry of your orator's building along the highway, which is valuable, and by obstructing the light, air and view necessarily ensuing therefrom, and by depreciating the rental value of your orator's property, in that the view of persons going south along said highway

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north of your orator's building will be cut off from your orator's building." It was further averred that complainant's valuable tenants would leave the building, and had threatened to leave, if the columns encroached on the highway.

In the prayer of the bill the complainant asked "that a preliminary injunction may issue from your honor's court, directed to the said The First National Bank of Montgomery, Alabama, its officers, agents or servants, architects and contractors in charge of said building of the said First National Bank, enjoining and restraining it, its officers, agents and servants, architects and contractors in charge of said building as aforesaid from placing said stone columns on said highway, as aforesaid; and from placing any encroachment whatsoever on said highway which is intended to be permanent, and upon a hearing thereof, your orator prays that said injunction may be made perpetual, and that said The First National Bank be perpetually enjoined from placing any stone columns, blocks, steps, or any encroachment intended to be permanent upon said highway, in front of its said building as aforesaid, and that it may be ordered to remove any encroachment which it has already caused to be placed on said highway of a permanent nature in front of its said building as aforesaid."

On August 2, 1901, the judge of the city court awarded a temporary injunction. On August 8, in the further argument of the cause, the judge vacated the order granting the temporary injunction. Thereupon on the same day, upon petition addressed to the Chief Justice of the Supreme Court, a temporary restraining order was granted, upon the consideration of the application of the complainant for a temporary injunction, and on August 10 the Chief Justice of the Supreme Court granted a temporary injunction.

The respondent filed a sworn answer, in which he set up three pleas. The answer and pleas were amended after the issuance by the Chief Justice of the temporary injunction. It is unnecessary to set out at length the averments of the answer. The pleas as amended were as follows: Answering the bill, and by way of first

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plea, defendant averred on information and belief that if the line between the street and abutting property owners is as contended by complainant in his bill, then complainant's building itself extends into and encroaches upon Commerce street, and if defendant's columns would encroach into the street and constitute a public nuisance, then complainant's building also encroaches on the street and constitutes a public nuisance, and complainant is *in pari delicto* with defendant, and the special injury alleged in the bill to complainant's light, air and view will be done to the part of his building which itself constitutes a public nuisance; but defendant denies that its building will obstruct the light, air or view from the building of complainant, and denies that complainant is entitled to have light, air and view to his building across lands in which the defendant owns the fee, and over which the complainant and the public generally have only an easement of passage.

Further answering, and by way of second plea, defendant says that before beginning the construction of its building, it called upon the proper authorities of the city of Montgomery to point out and establish the true line between its property and the street, and it was its *bona fide* intention to conduct itself in a lawful manner in reference to the position and construction of its building, and with that view called upon the city authorities to point out the line; that the city failed and refused to point out the line, and thereupon, out of abundance of caution, it applied to the city for, and the city granted, permission to it to project the base of its building 26 inches beyond the property line and to set up on such base four stone columns to project 22 inches beyond said property line; that the sidewalk in front of the buildings of complainant and defendant is wide and spacious and the placing of the columns in front of defendant's building would not in any manner interfere with or injure the rights of the public to ready and convenient passage along the sidewalk; that to this time, defendant had only erected in front of its building now in course of construction, a foundation flush and level with the sidewalk upon which the bases

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for the columns are to stand, which bases will extend 1 foot 10 inches above the level of the sidewalk, and 26 inches from the front of the main building in the course of construction; that the columns are to be 16 feet high sitting on such bases, and each of them at the bottom will extend only 22 inches beyond the present front wall of the building and taper to the top, which will only be 18½ inches from the line of the front wall; that the column nearest complainant's building will be 1 foot 10 inches from the north wall thereof, and not nearer; that the city of Montgomery now has and for years has had authority generally to control and regulate the streets of the city for any and all purposes, and to alter, widen, cut down, extend or otherwise alter or improve all streets or sidewalks; and upon advice of counsel defendant says that, even if the columns extend into the street, the city had authority to grant defendant permission to extend them as above described to be intended by this defendant; upon information and belief, defendant says that every city in Alabama, including Montgomery, for years past, and long prior to the enactment of the present charter of Montgomery, and many of its previous charters, the power of municipal corporations to grant permission to abutments on streets to place permanent ornaments in front of their buildings, encroaching into the public highway, has been exercised under such authority by municipalities, as the city of Montgomery has to control its streets as above recited; that this was well known and a matter of public notoriety and history at the time of the enactment of the present charter of Montgomery, as well as when its previous charters were enacted, and said city had frequently exercised the power granting like and more extensive permissions than the permission above described, and under such permissions many buildings have been constructed and are now standing in the city of Montgomery, including the two on Commerce street next south of complainant's building, whose ornaments attached to their fronts encroach into the highway, if defendant's columns would encroach into Commerce street; wherefore, upon advice of counsel, defendant says it was the intention of the legislature, and

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it had the power to confer upon the city of Montgomery, and did confer it, the power to grant such permission as has been granted to defendant, and whether defendant was acting under said permission or under its rights as the owner of the land upon which the columns are to be constructed depends upon where the line of the property of this defendant and Commerce street is; that defendant owns the fee to the center of Commerce street in front of its building, subject alone to the right of complainant and the public generally to pass to and fro along the street, and complainant had no other right or rights in reference to the part of said street in front of defendant's building to which it owns the fee.

Further answering, and by way of third plea, defendant says that its building is planned to be six stories, to be erected, and being erected at large cost, for banking and office purposes; that defendant had made contracts for the completion of the building by September 1st, which defendant alleges on information was known to complainant when he made objection to said columns; that after the building of the basement of the building and the construction of the foundation for the bases of the columns, and not before, complainant objected to the columns, and defendant thereupon exhibited to him the plans of the building which showed fully and precisely the proposed location of the columns, which plans had been prepared months previously and were the basis of a contract between the defendant and John W. Hood & Co. for the construction of the building and the purchase of the columns at a large price, which defendant says on information and belief was well known to complainant; that defendant explained to complainant the position the columns would occupy and discussed the contemplated change of the plans so as to omit said columns therefrom; that complainant then withdrew all objections to defendant proceeding with its plans in placing said columns in position, and complainant when he withdrew said objection informed defendant that since he had seen the plans he was satisfied that placing the columns in such position as planned would not injure him or his build-

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ing, but would add to the value of his buliding; that, as was well known to complainant, no part of the six stories of the building was at that time constructed above the basement, which was at that time flush and on a line with the sidewalk; that if complainant had then insisted on his objection, defendant could have yielded thereto at that time without any very great expense, but that a continuance of the plans of defendant for the main part of its building called for the expenditure of \$50,000 or more, as was well known to complainant when he withdrew his objection; that some time elapsed between the withdrawal of the objections and the continuance of the construction of the building, and defendant, relying upon complainant having withdrawn his objections to the columns, proceeded with the building above the first story and completed all the walls thereof, and not until after defendant had done this did complainant in any manner renew his objections to the columns; that the columns are to stand in front of and as a part of the first story of the building, and the first story will be incomplete and unfinished without them, would present a rough and unkept appearance, and the columns are, as was well known to complainant when he withdrew his objection and when he renewed it, a material and necessary part of the building and a part of the support of the same; that after the renewal of the complainant's objection, it would have cost the defendant \$10,000 and caused it to make a breach of its contract with John W. Hood & Co. for the construction of the building, and with tenants to whom it had let space therein, to have removed the first story so as to comply with the wishes of complainant in refraining from proceeding with said plans so that said columns would be a necessary part thereof. Wherefore, defendant says, on advice of counsel, that complainant has estopped himself from renewing his objection and maintaining this bill, and that, even if complainant would suffer any injury special to himself, and not common to the public, from said columns, he, by his acts, conversations and conduct above described, well knowing all the facts, has induced

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and permitted defendant to go to great trouble and expense, and, before a renewal of his objection, has induced and permitted defendant to proceed with its building on a plan including the columns to a point at which it would have been a great expense to change the same so as to omit the columns or so as to place them further back from the street, if indeed it would not have been impracticable and impossible to do so without a violation of its contract with Hood & Co., and its prospective tenants; that if complainant would suffer any injury from the columns being placed in position as planned, it would be infinitesimal in comparison with the immediate, proximate and necessary injury which defendant would suffer from the granting of an injunction; whereby, on advice of counsel, defendant says complainant has estopped himself from insisting upon any special injury by reason of the columns, without the averment and proof of which special injury complainant cannot maintain the suit. And defendant further says, on advice of counsel, that complainant is not entitled to have light, air and view come to his building from that part of the street in front of defendant's building to which the defendant has the fee, and that the only easement to which the public or complainant is entitled over that part of the street to which defendant has the fee, is the right of passage to an fro.

The defendant also demurred to the bill upon nineteen grounds, which were in substance as follows: 1. There is no sufficient averment of intention to obstruct Commerce street or to create a public nuisance. 2. Complainant does not show that he will suffer irreparable damage. 3. It does not appear but that the city of Montgomery consented to the erection of the columns. 4. It is not shown that the columns will be beyond or off of the property of the bank. 5. It is not shown where the building line is, or that defendant intended to go beyond its own property into the street. 6. No obstruction of the street is shown, and no more is shown than a mere encroachment for the prevention of which the court is without jurisdiction at the suit of a private party. 7. Complainant has a complete and adequate remedy at law for depreciation in the value of his building, loss in rents, and destruction of

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its symmetry, has no right to light, air or view from the part of Commerce street upon which the bank's building fronts, and any obstruction to it *damnum absque injuria*, for which he has no right of action. 8. No injury special and peculiar to complainant, and not common to the public generally, is shown. 9. It is not shown that the complainant has applied to the proper authorities of the city to prevent the alleged nuisance.

The complainant filed exceptions to these pleas upon the ground that the same were insufficient at law and presented no facts upon which the complainant could join issue. The defendant moved to discharge the temporary injunction upon the following grounds: "1. Said injunction was granted without authority of law. 2. Said Chief Justice had no jurisdiction to grant said injunction. 3. In this cause an injunction was granted by Hon. A. D. Sayre, and was in force from August 2d, to August 8th, 1901, at which last date the order granting said injunction was set aside upon the release by defendant of all damages, and said injunction was then, by Hon. A. D. Sayre, refused. Wherefore, defendant says that no such case was presented as authorized said Chief Justice to act in the premises, and grant said injunction." There was also a motion made to dissolve the injunction.

The cause was submitted upon the exception of the complainant to the three pleas filed by the defendant upon the motion to discharge and dissolve the injunction, and upon the demurrers to the bill. The chancellor rendered a decree overruling the motions to discharge and dissolve the injunction and the demurrer to the bill and sustained the exceptions to the several pleas. From this decree the defendant appeals, and assigns the rendition thereof as error.

WATTS, TROY & CAFFEY, for appellant.—1. To entitle a private citizen to maintain a bill to enjoin the commission of a public nuisance, he must show a material damage which is irreparable and special and peculiar to himself, and not suffered by the public in common with him.—*Mayor v. Rogers*, 10 Ala. 47; *Ala., etc.*,

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Co. v. Ga. Pa., 87 Ala. 157; *Crommelin v. Coxe*, 30 Ala. 328; *Perry v. New Orleans*, 55 Ala. 421; *L. & N. v. Mobile*, 124 Ala. 162, 166; *Columbus v. Witherow*, 82 Ala. 190, 193-4; *Whaley v. Wilson*, 112 Ala. 631, and 120 Ala. 504; *Adler v. Metropolitan, etc., Co.*, 138 N. Y. 179; 14 Ency. Pl. & Pr., 1137, 1138, 1145.

2. Without express provision to the contrary, dedication of land for a street gives only an easement of passage over it to the public, and the fee of the center to the street remains in the abutting proprietor.—*Perry v. N. O., etc., R. Co.*, 55 Ala. 424; *M. & M. v. Ala. Mid.*, 116 Ala. 57-8.

3. Every injury done to another by the use of one's own property is *damnum absque injuria*, unless the injured party has acquired a right in the nature of an easement of such property.—*Moody v. McClelland*, 39 Ala. 51; *Myer v. Hobbs*, 57 Ala. 175; *Taylor v. Armstrong*, 24 Ark. 104-5; *Packet Co. v. Sowels*, 50 Ark. 471-2.

4. Decrease in money value or income producing capacity of property is not irreparable injury.—*Rouse v. Martin*, 75 Ala. 515; *Rosser v. Randolph*, 7 Porter 245; *Winter v. City Council*, 93 Ala. 541; *Zabriskie v. Jersey City*, 13 N. J. Eq., 314, 318; *Morris v. Pruden*, 20 N. J. Eq., 530, 537; *Dana v. Valentine*, 3 Metc. (Mass.) 8; *Atty. Gen. v. Nichols*, 16 Vesey, Jr., 342-3; *Warren v. Brown*, L. R. (1900), 2 Q. B. 722; 2 Story Eq. Juris., § 925; 1 High Injunctions (3d ed.), § 788; 1 Wood, Nuisances (3d ed.), § 511; 16 Am. & Eng. Ency. Law (2d ed.), 361.

5. When an abutter has no title to a certain part of the street, nothing done thereon which merely decreases the value of his property is an actionable wrong to him.—*Decker v. Evansville, etc.*, 133 Ind. 493; *Grand Rapids v. Heisel*, 38 Mich. 62, 68-70; *Indiana v. Ebersole*, 110 Ind. 545.

6. Continuous proprietors have no rights to light, air or view across the lands of each other.—*Ray v. Lynes*, 10 Ala. 63; *Ward v. Neal*, 37 Ala. 501; *Jesse French v. Forbes*, 129 Ala. 471; *Graves v. Smith*, 87 Ala. 450; *Parker v. Foote*, 19 Wend. 309, 318-19; *Garrett v. Janes*, 65 Md. 260, 271; *Alfred's Case*, 9 Coke, 59;

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Knowles v. Richardson, 1 Mod. 55; *Butt v. Imperial Co.*, 2 Ch. Ap. 160; *Jenks v. Williams*, 115 Mass. 217; *Turner v. Thompson*, 58 Ga. 268.

7. Easement can only be acquired in three ways; (1) by express grant; (2) by implied grant; (3) by prescription.—*Jones on Easements*, § 80; 10 Am. & Eng. Ency. Law (2d ed.), 409, 418, 426; 19 *Ib.* 1125-26.

8. In the nature of things, no easement of light, air, or view from the highway can be acquired by adverse use.—*Jesse French Co. v. Forbes*, 129 Ala. 471.

9. An easement of light, air and view by implied grant extends only to what is necessary for the reasonable and comfortable enjoyment of the premises.—*Ray v. Lynes*, 10 Ala. 66; 19 Ency. Law (2d ed.), 115, 120, 121; 10 *Ib.* 424; *Jones on Easements*, §§ 154-7; *Paine v. Chandler*, 134 N. Y. 385; *Robinson v. Clapp*, 65 Conn. 383, 388; *Morrison v. Marquardt*, 24 Iowa 64; *Bonelli v. Blackmore*, 66 Miss. 136; *McBryde v. Sayre*, 86 Ala. 458, 463; *Williams v. Gibson*, 88 Ala. 232-5; *Nichols v. Luce*, 24 Pick. 102.

10. The quantum of light, air, and view to which one is entitled, whether his easement is gained by implied grant or by prescription, is the same; and where the right comes by prescription, it is well settled that it is limited to necessity.—*Warren v. Brown*, L. R. (1900), 2 Q. B. 722; *Back v. Stacey*, 2 Car. & P. 465; *Kalk v. Pearson*, 6 Ch. Ap. Cas., 811; *City v. Tennant*, 9 Ch. Ap. Cas., 212; *Fifty Asso. v. Tudor*, 6 Gray 255; *Atty. Gen. v. Nichols*, 16 Vesey, Jr., 342-3; *Ray v. Lynes*, 10 Ala. 66; 10 Ency. (2d ed.), 424.

O. C. MANER, *contra*.—The encroachment by the erection of the pillars on a public street constitutes a public nuisance and can be abated or enjoined.—*State v. Edens*, 85 N. C. 526; *McCloughry v. Finney*, 37 La. Ann. 31; *Webb v. Demopolis*, 95 Ala. 116; *Costello v. State*, 108 Ala. 45; *Reid v. Mayor and Aldermen of Birmingham*, 92 Ala. 339; *Field v. Barling*, 24 L. R. A. 406; *Flynn v. Taylor*, 14 L. R. A. 556; *Dill v. Board of Education*, 10 L. R. A. 276; *State v. Berdetta*, 73 Ind. 185; *State v. Mobile*, 5 Port. 279; *Cabbell v. Williams*, 127 Ala. 320.

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The complainant although a private citizen, being injured by the encroachment on a sidewalk, in a way different from the public in general, can maintain the present bill. It is a well settled principle of law that one sustaining a peculiar injury to himself not suffered by the general public may maintain a bill in equity to have a public nuisance abated.—*Cabbell v. Williams*, 127 Ala. 320; *Douglas v. City Council*, 118 Ala. 599; *Nininger v. Norwood*, 72 Ala. 277; *Kennedy v. Jones*, 11 Ala. 63. "In addition to the rights of the public to maintain a suit in equity for an injunction, private citizens who are specially injured by an obstruction and interested in preventing its continuance, may, upon a proper showing, maintain a suit in equity for an injunction.—*Elliott on Roads and Streets* (2d ed.), § 665; *Field v. Barling*, *supra*; *Dill v. Board of Education*, *supra*; *Flynn v. Taylor*, *supra*; *Casebeer v. Howry*, 55 Pa. St. Rep. 419.

"An unlawful deprivation of a substantial legal right necessarily implies injury to the party so deprived."

It has been well settled by many well considered cases that an abutter upon a public street has an easement in the street for ingress and egress to and from his premises and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon.—*Storey v. N. Y. Elev. R. Co.*, 90 N. Y. 122; *Lahr v. Met. Elev. R. Co.*, 104 N. Y. 268; *Barnett v. Johnson*, 15 N. J. Eq., 481; *Dill v. Board of Education*, 10 L. R. A. 276; *Field v. Barling*, 24 L. R. A. 406; *Elliott on Roads and Streets* (2d ed.), § 695.

It has been expressly decided that the municipality except by valid legislative authority (and by this we do not concede that the legislature can authorize a private obstruction to a public street) cannot license or permit any private encroachment on a public highway, and that any private encroachment on a public highway is a nuisance *per se* even though permitted and sanctioned by the authorities of the city.—*State v. Mobile*, 5 Port. 279; *Webb v. Demopolis*, 95 Ala. 116; *Costello v. State*, 108 Ala. 45; *Holle v. Atty. Gen.*, 72 Ala. 411;

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City of Mobile v. L. & N. R. R. Co., 124 Ala. 132; *L. & N. R. R. Co. v. M. J. & K. C. R. R. Co.*, 124 Ala. 162; *Elliott on Roads and Streets* (2d ed.), § 653; *Field v. Barling*, 24 L. R. A. 406; *Flynn v. Taylor*, 14 L. R. A. 556; *Reimer's Appeal*, 100 Pa. St. Rep. 185; *Townsend v. Epstein*, 49 Atl. Rep. 629.

HARALSON, J.—The cause was submitted for decree on the pleadings, the exceptions of complainant to the three pleas filed by the defendant, the motions to discharge and dissolve the injunction, and on the demurrer to the bill, accompanied by the several affidavits filed by the complainant and defendant.

It may be stated broadly, since it seems to be everywhere settled in this country, that a building or other structure of like nature, erected on a street—which includes its sidewalks—without the sanction of the legislature, is a nuisance; that public “highways belong from side to side and from end to end to the public,” and they are entitled to a free passage along any portion of it, not in use by some other traveller, and there can be no rightful permanent use of the way for private purposes.—*Elliott on R. & S.*, § 645. This court has said: “The public have a right to passage over a street, to its utmost extent, unobstructed by any impediments, and any unauthorized obstruction which necessarily impedes the lawful use of a highway is a public nuisance at common law.”—*Costello v. The State*, 108 Ala. 45. Again, it is said: “Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is, of itself, a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to any one. It is an encroachment upon a public right, and as such, is not permitted to be done by the law, with impunity.”—*State v. Edens*, 85 N. C. 526.

It is again well settled, that a municipal corporation cannot license the erection or commission of a nuisance in or on a public street. “A building,” says Dillon, “or other structure of like nature, erected upon a street, without the sanction of the legislature, is a nuisance.

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and the local corporate authorities of a place cannot give a valid permission thus to occupy streets, without express power to this end conferred on them by the charter or statute. The usual power to regulate and control streets has even been held not to authorize the municipal authorities to allow them to be encroached upon by the adjoining owner, by erections made for his exclusive use and advantage, such as *porches* extending into the streets, or flights of stairs leading from the ground to the upper stories of buildings, standing on the line of the streets. The person erecting or maintaining a nuisance upon a public street, alley or place, is liable to the *adjoining owner* or other person who suffers *special damages* therefrom."—2 Dillon's Mun. Corp., § 660, and authorities there cited; *State v. Mayor*, 5 Port. 279; *Webb v. Demopolis*, 87 Ala. 666; s. c. 95 Ala. 116; *Hoole v. Attorney General*, 22 Ala. 194; *Costello v. The State*, *supra*; *Douglas v. City Council*, 118 Ala. 599.

There can be no question but that the erection of the proposed pillars by defendant in front of its building on the street, and which are to extend, as admitted, twenty-two inches beyond the west line of said building onto the sidewalk, is a public nuisance, to abate which, the public might maintain a bill.—*Reed v. Mayor*, 92 Ala. 34; 1 Dillon on Mun. Corp., § 374; Elliott on R. & S., §§ 664, 665; authorities *supra*.

It is also well understood, that, in addition to the right of the public to maintain a suit in equity for an injunction against the erection and maintenance of a public nuisance, a private citizen who sustains an injury therefrom, different in degree and kind from that suffered by the general public, may maintain a suit in equity to enjoin it.—*Cabbell v. Williams*, 127 Ala. 320; *Mayor v. Rodgers*, 10 Ala. 36, 47; Elliott on R. & S., § 665. As to the injury being irreparable, or not capable of full and complete compensation in damages, as is sometimes said to be the requirement in case a private citizen complains to abate it, Mr. Elliott observes in the section referred to, that "the phrase, 'irreparable injury' is apt to mislead. It does not necessarily mean, as used in the law of injunctions, that the injury is be-

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yond the possibilities of compensation in damages, nor that it must be very great. And the fact that no actual damages can be proved, so that in an action at law the jury could not award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one."—*Ogletree v. McQuaggs*, 67 Ala. 580.

On the same subject Mr. Wood states, that "By irreparable injury, is not meant such injury as is beyond possibility of repair, or beyond possibility of compensation in damages, nor necessarily great injury or great damage; but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or small on the other, is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law."—2 Wood on Nuisances, § 778 and n.; 3 Pom. Eq. Jur., § 1349; *Whaley v. Wilson*, 112 Ala. 630.

The bill alleges, "that said encroachment [of the erection of said pillars on the sidewalk] upon said highway is a public nuisance, not only infringing upon the rights of the commonwealth of Alabama, but if same are completed and placed in position, as now contemplated by the First National Bank, said encroachment will greatly damage your orator beyond that which is common to the public generally, by injuring and depreciating the value of your orator's property, and by destroying the symmetry of your orator's building along the highway, which is valuable, and by obstructing the light, air and view necessarily ensuing therefrom, and by depreciating the rental value of your orator's property, in that the view of persons going south along said highway north of your orator's building, will be cut off from your orator's building." He also avers that the tenants in his building are valuable to him, and some of them have informed complainant, that if said columns encroach on said highway, or if any part of said building of defendant encroaches on said highway, they will no longer remain his tenants. Here is averment of special damage to complainant, apart from that which may be suffered by the public at large.

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It appears that the bases of the columns proposed to be erected in front of defendant's building are outside of the west wall of the main structure to which they are expected to be attached, and as is averred and not denied, "are to extend from the sidewalk, sixteen feet in height, more or less, and are to extend two feet more or less (22 inches seems to be the real extent) beyond the established building line on said highway, into and upon the street." It is wholly immaterial, it may be added, whether these columns are designed to be for ornament or utility, or whether defendant will be prejudiced more by the temporary injunction against their erection, than complainant might be, if it had not been granted.

We try the case on this appeal, on the pleadings as they are presented, in advance of any evidence taken in the cause. Whether the evidence when taken will, on submission of the case for final disposition, sustain the averments for relief or not, we are not given to know. It is a case as presented, as the court below held, and we think properly, where, everything considered, the complainant was entitled to his injunction, and its continuance, to await the final disposition of the cause. *Harrison v. Yerby*, 87 Ala. 185.

The defendant, it may be conceded, owns as it claims, to the center of the street in front of its building, and its right to the use of its property in any way it pleases, subject only to the easement of the public along the street, as a thoroughfare of travel and commerce; but it denies to complainant the right to light, air and view, except from that part of the street immediately in front of his property. So far as light and air are concerned, the subject has been much discussed, and may be taken as well settled, but the question of view, if distinguishable from these, has not often arisen. The easement of light and air is placed, on what would seem to be good reason, and certainly on authority, along with the easement of access, the one no more important than the other, except in degree. This easement of access, says Mr. Elliott, "is so far regarded as private property that not even the legislature can take it away and deprive the owner of it without compen-

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sation. In New York and in most of the States in which the question has arisen, the abutter has an easement in the light and air over the street, and 'above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner,'” In support of the text, note 1, many authorities from different courts are cited, including the case of the *N. Y. Elevated Railroad Co. v. Fifth Nat. Bank*, 135 U. S. 432. In the case last cited the court say: “The owners of lands abutting on a street in the city of New York have an easement of way and of light and air over it; and through a bill in equity for an injunction, may recover of the elevated railroad company full compensation for this easement; but in an action at law, cannot, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing action.”

From the well considered case of *Barnett v. Johnson*, 15 N. J. Eq. 481, we quote approvingly what we consider to be especially applicable to the case in hand, that there are “Two classes of rights, originating in necessity and in the exigencies of human affairs, springing up coeval with every public highway, and which are recognized and enforced by the common law of all civilized nations. The first relates to the public passage, the second, subordinate to the first, but equally perfect and scarcely less important, relates to the adjoining owners. Among the latter is that of receiving from the public highway light and air * * * When people build upon the public highway, do they inquire or care who owns the fee of the road-bed [or street]? Do they act or rely on any other consideration except that it is a public highway, and they the adjacent owners? Is not this a right of universal exercise and acknowledgment in all times and in all countries, a right of necessity, without which cities could not have been built, and without the enforcement of which they would soon become tenantless? It is a right essential to the very existence of dense communities. * * * It is a

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right founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactment and all judicial decision." *Dill v. Board of Education*, 10 L. R. A. 276; *Field v. Barling*, 149 Ill. 556. s. c. 24 L. R. A. 406.

In the case of *Dill v. Board of Education*, *supra*, touching the rights of parties to streets dedicated to public use, the court said: "If we inquire what those rights are, we find that they are twofold: *first*, a right of access from the abutting property, and a passage to and fro over it in all its extent; and, *second*, a right of light, air, prospect and ventilation. These rights are quite distinct from each other, and capable of being separately exercised and enjoyed. The right of light, air and ventilation may be enjoyed fully without the least exercise of the right of access and passage. That this right of light, air, prospect and ventilation exists is clearly established by the authority of this and other States."—*Hallock v. Scheyer*, 33 Hun. 111.

It is difficult to understand, why an easement of view from every part of a public street, is not, like light and air, a valuable right, of which the owner of a building on the street, ought not to be deprived by an encroachment on the highway by a coterminous or adjacent proprietor. The right of view or prospect, is one implied, like other rights, from the dedication of the street to public uses. As was well said by the learned judge below in respect to this right, "It seems to be a valuable right appurtenant to the ownership of land abutting on the highway, and to stand upon the same footing, as to reason, with the easement of motion, light and air, and to be inferior to them only in point of convenience or necessity, and that an interference with it is inconsistent with the public right acquired by dedication. The opportunity of attracting customers by a display of goods and signs is valuable, as I have no doubt the streets of any city in the world will demonstrate." As to these and all other matters brought forward, the in-

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junction should await the decision of the cause when tried for final decree, on pleadings and proof taken.

The demurrer on the ground that it is not alleged in the bill that complainant had applied without success to the authorities of the city of Montgomery for relief, is wanting in merit. He had a right to file the bill without reference to any action taken by the city.—*Douglas v. City Council of Montgomery*, 118 Ala. 611. The demurrer as to any of its grounds was properly overruled.

From what has been said, it will appear that the first and second pleas were properly held to be without merit. See *L. & N. R. R. Co. v. M. J. & K. C. R. R. Co.*, 124 Ala. 162; *Webb v. Demopolis*, 95 Ala. 116, respectively, as to each of these pleas. The court held, that the third plea, as originally filed was good; but as amended was bad for duplicity,—citing Story Eq. Pl. 653. Without considering the third plea as originally filed, we concur with the court below, that as amended, it was bad for duplicity. There was no error in overruling the motion to discharge and dissolve the injunction, and, finding no reversible error in any of the rulings of the court below, let its decree be affirmed.

Affirmed.

Tyson, J., not sitting.

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Bill in Equity to remove Cloud from Title.

1. *Bill in equity to remove cloud from title; burden of proof.*

Where a bill is filed by a married woman to remove a cloud from her title, and the title of the complainant is claimed by mesne conveyances from her husband, and the defendant in his answer sets up that the conveyances by which the complainant claims title were made to hinder, delay and defraud the defendant and other creditors of the husband, the burden is upon the complainant to establish her title and possession as alleged in the bill, and to show a consideration paid

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for the property, and in failing to meet this burden the complainant is not entitled to the relief prayed.

2. *Same; landlord and tenant; right of stranger to maintain bill.*

The attornment of a tenant to a stranger does not, of itself, destroy the possession of the landlord; and when the possession of the rented premises is tortiously gained from the tenant, or the tenant has been induced to attorn to a stranger, a court of equity will not, on such possession, entertain a bill at the instance of the tort-feasor, or the person attorned to, to remove a cloud from his title to the land.

APPEAL from the Chancery Court of Pike.

Heard before the HON. WILLIAM L. PARKS.

The bill in this case was filed by the appellee, Mrs. A. A. Collier, a married woman, against the appellee, M. N. Carlisle. The facts of the case are sufficiently stated in the opinion.

Upon the submission of the cause upon the pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed for, and ordered the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

A. C. WORTHY, for appellant, cited *Ray v. Womble*, 56 Ala. 32; *Lockett v. Hurt*, 57 Ala. 188; *Smith v. Gilmer*, 93 Ala. 224; 3 Brick. Dig., § 97; *Warren v. Wagner*, 75 Ala. 188; *Scott v. Cotton*, 91 Ala. 623; *Brooks v. Rogers*, 99 Ala. 438; *Davis v. Pou*, 103 Ala. 443.

GUNTER & GUNTER and M. N. CARLISLE, *contra*, cited *Bowling v. Crook*, 104 Ala. 133; *Campbell v. Davis*, 85 Ala. 56; *Tunley v. Hanner*, 67 Ala. 101; *Fleming v. Moore*, 122 Ala. 399; *Crim v. Nelms*, 78 Ala. 606.

TYSON, J.—The bill in this cause was filed to remove an alleged cloud upon the title asserted by complainant to certain lands described in the bill, and to enjoin the execution of a writ of possession for the land by respondent issued upon a judgment in ejectment obtained by him against one Hayes, who was, at the time of the rendition of the judgment in the possession of the land. On the final hearing, the bill was dismissed and this appeal is prosecuted from that decree.

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It is averred in the bill that complainant is in the actual possession of the land and has the legal title to it. She claims title as shown by her pleadings through mesne conveyance from her husband. Her claim of title is stated to be, a mortgage executed by her husband to J. C. Henderson of date April 1, 1891, a transfer of that mortgage by Henderson to one Lane of date February 19, 1895, a transfer by Lane to complainant on November 22, 1895, deed by complainant and her husband on foreclosure of mortgage to one Robertson of date April 6, 1896, and a deed from Robertson and wife to complainant of date December 31, 1896.

Neither of the transfers of the mortgage were recorded and the deed to Robertson and the one from Robertson to complainant were not recorded until March 8, 1899. Nor was the execution of the transfers or assignment of the mortgage proven.

In his answer, the respondent denies the complainant's title and possession and asserts title in himself, claiming to have derived it under a sheriff's deed executed to him by virtue of a sale under an execution issued upon a judgment obtained by him against the complainant's husband in 1895. It is also averred that the alleged transfer by Lane to complainant was made to hinder, delay or defraud the respondent, who at that time was a creditor of the husband. That the complainant furnished no part of the money paid Lane, but that it belonged to her husband, the mortgagor. It is further averred that the deed to Robertson and the one from him to complainant was without consideration, and that Robertson never went into possession of the land as purchaser at the foreclosure sale or otherwise, or exercised any acts of ownership over it; but that these deeds were a part of the scheme of complainant and her husband to defraud the respondent as a creditor of the husband and to put the land beyond his reach.

Under the issues thus presented by the pleadings it is entirely clear that the burden was upon the complainant to establish her title and possession as alleged. The paper purporting to be a transfer or assignment of the mortgage, by Henderson to Lane and by Lane to com-

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plainant was not self-proving. The respondent not being a party to it, proof of its execution should have been made. This was not done. The objection to its introduction in evidence by respondent on that ground should have been sustained. With these transfers eliminated, the complainant has failed to prove her title as alleged. Nor do we think that she has discharged the burden of proving her possession of the land at the date of the filing of the bill. The preponderance of the testimony shows that Bragg and Pritchett rented the land for the year 1900 from Mrs. Hayes, who was in possession as the tenant of the respondent. That after renting the land from her, they at the instance of complainant's husband attempted to attorn to the complainant as her tenant for that year. It is only by and through this tortious act of theirs and hers, that she claims to be in possession. This is not such a possession as a court of equity will protect.—*Fleming v. Moore*, 122 Ala. 399, and authorities therein cited. It is of no consequence that their rental contract with Mrs. Hayes may have been void, under the statute of frauds. They acquired the possession from her and they cannot be permitted, without first surrendering the possession to her, to dispute her title or her right to the possession.

Furthermore, the defense of fraud set up in respondent's answer was a good one and imposed upon complainant the burden of showing a consideration paid by her for the land, since respondent's debt was a subsisting one at and prior to the transfer of the mortgage to her by Lane, if ever made, and the execution of the other conveyances through which she claims title.—*Kelley v. Connell*, 110 Ala. 543; *Wood v. Riley*, 121 Ala. 160. It is of no consequence that the answer was not made a cross-bill seeking affirmative relief against these several conveyances which are alleged to have been made to hinder, delay or defraud this respondent in the collection of his debt against the husband. If fraudulent, as alleged, she cannot invoke the aid of a court of conscience to protect a possession acquired under them. The complainant having utterly failed to meet the bur-

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den of proof cast upon her by this defense she must fail.

There is no error in the record, and the decree must be affirmed.

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Action against Railroad Company to recover Damages for Killing Stock.

1. *Pleading and practice; actions ex delicto and ex contractu can not be joined.*—A complaint which contains a count in case, which is *ex delicto*, and another count which is in *assumpsit*, is subject to demurrer for misjoinder of actions.
2. *Same; when complaint is in assumpsit and not in case.*—In an action against a railroad company to recover damages for the loss of hogs, a count of the complaint, which after averring that the stock were killed by being run over by a train operated on the defendant's road, then avers that the defendant had contracted with the plaintiff that, in consideration of the construction of a right of way over plaintiff's lands, it would keep the railroad fenced on both sides through plaintiff's lands and keep and maintain cattle guards at the boundary of plaintiff's lands, and that while the defendant had constructed such fences and cattle guards, it carelessly and negligently allowed the same to get out of repair and become destroyed, and that by reason of such failure and negligence of duty on the part of defendant the plaintiff's stock entered upon the defendant's railroad track and was killed, states a cause of action in *assumpsit*. (Tyson, J., *dissenting*, holds that such count states a cause of action in case.)
3. *Railroad company; effect of agreement with land owner to build and maintain fences and cattle guards.*—An agreement by a railroad company with a land owner that it will build and maintain fences and cattle guards in consideration of the latter's grant of a right of way, is *prima facie* binding on the company to pay the land owner for injuries to stock entering on the track of the railroad company in consequence of the company's failure to maintain the fences and cattle

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guards in accordance with the terms of the contract.

4. *Same; same; action for breach thereof.*—In an action against a railroad company to recover damages to the plaintiff's stock, resulting from the breach of a contract entered into between the plaintiff and the defendant, by which the railroad company agreed to build and maintain fences and cattle guards through the land of the plaintiff, it is unnecessary for the complaint to aver when the contract was first broken; since the breaches may be several and continuous.
5. *Statute of frauds; how defense presented.*—The statute of frauds, to be available as a defense, must be specially pleaded, and such defense can not be taken advantage of by demurrer.

APPEAL from the Circuit Court of Hale.

Tried before the Hon. JOHN MOORE.

This was an action brought by the appellant, A. P. Evans, against the appellee, the Southern Railway Co. The suit was originally commenced in a justice of the peace court and was carried by appeal to the circuit court. In the circuit court the plaintiff filed a complaint containing two counts. In the first count the plaintiff sought to recover the sum of thirty dollars for the killing of two hogs by a train operated on the defendant's railroad track, and averred in said count that the defendant "so negligently operated said locomotive and train of cars attached thereto that in consequence of the negligence of the defendant, its agents, servants or employees, two hogs of the plaintiff were run over" by said locomotive or train of cars and were killed. In the second count, after averring that the plaintiff's two hogs were run over and killed by a train of cars operated on the defendant's track, the plaintiff then averred as follows: "That the defendant had contracted with him in construction of a right of way through and over this plaintiff's land; that they would keep said railroad fences on both sides through plaintiff's land, and keep and maintain cattle guards at the boundary of plaintiff's land, and plaintiff avers that defendant did construct such fences and cattle guards, but that the defendant negligently and carelessly allowed the said fences and cattle guards to get out of repair or become destroyed. And plaintiff avers that by reason of such negligence and failure of duty on the part of defendant,

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plaintiff's hogs entered upon the right of way and railroad track of defendant."

The defendant demurred to this complaint upon the ground that there was a misjoinder of counts, in that count number one was *ex delicto* and count number two was *ex contractu*. This demurrer was sustained. After the demurrer to the complaint containing the two counts was sustained, the plaintiff filed another count, numbered three, in which he averred the operation by the defendant of a train of cars along its road and that said train of cars so operated by the defendant ran over and killed the two hogs belonging to the plaintiff. The third count of the complaint then continued as follows: "And plaintiff avers that the defendant had contracted with him, to-wit, January 1st, 1876, in consideration of a right of way, through and over the plaintiff's land that it would keep its said railroad track fenced on both sides through plaintiff's land, and to keep and maintain cattle guards at both ends or boundaries. And plaintiff avers that defendant did construct such fences and cattle guards in consideration of the grant of the right of way by plaintiff to defendant over plaintiff's land, but that the defendant prior to October 25th, 1899, failed and refused to keep the same in repair, and that by reason of such failure and refusal to do and perform what they had contracted to do, two hogs of plaintiff entered upon the right of way of defendant and were killed by defendant's engine and cars to the damage of plaintiff, \$30."

The defendant demurred to this complaint upon the following grounds: "1st. Because said count fails to allege where said contract was made. 2d. Because said count fails to allege whether said contract was in writing. 3d. Because said count fails to allege when said contract was broken by defendant. 4th. Because said count fails to state any cause of action against defendant. 5th. Because said plaintiff in said count does not claim damages for a breach of said alleged contract, but claims damages for the killing of two hogs and fails to state or allege any facts that would entitle the plaintiff to recover in this action." This demurrer was

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sustained. Thereupon the defendant filed another count of the complaint numbered four. Upon the objection to the filing of the count number four, and a motion by defendant to strike the same from the file, the court sustained said objection and granted said motion. Thereupon the plaintiff declining to plead further, judgment was rendered for the defendant. The judgment entry contains several rulings upon motions made by the defendant, and to which rulings the plaintiff separately excepted. There is no bill of exceptions set out in the transcript. The plaintiff appeals, and assigns as error the several rulings of the trial court upon the pleadings.

THOS. E. KNIGHT, for appellant, cited *Littleton v. Clayton*, 77 Ala. 571; *W. U. Tel. Co. v. Mayer*, 61 Ala. 158.

F. L. PETTUS and A. M. TUNSTALL, *contra*.

SHARPE, J.—Count 1 of the complaint first filed in the circuit court, was in case and count 2 was in assumption. Those counts were improperly joined.—*Morris v. Eufaula Nat. Bank*, 122 Ala. 580.

Count 3 was not subject to the demurrer. An agreement by a railroad company with a landowner to build and maintain fences and cattle guards in consideration of his grant of a right of way, is *prima facie* binding on the company to pay the landowner for injuries to his animals entering on the track in consequence of the company's fault in failing to maintain fences in accordance with the terms of the contract.—*Chicago, etc., R. Co. v. Barnes*, 116 Ind. 126; 38 Am. & Eng. R. Cases, 297; *Louisville, etc., R. R. Co. v. Sumner* (Ind.), 24 Am. & Eng. R. Cases, 641; *Ky. Cent. R. Co. v. Kenney* (Ky.) 20 Am. & Eng. R. Cases, 458.

While such a contract is continuing, breaches of it may be several and continuing.—*Phelps v. The New Haven, etc., R. Co.*, 43 Conn. 453. It is, therefore, unnecessary for a complaint in declaring on the contract to aver when the contract was first broken.

If the contract was not in writing and is for that reason obnoxious to the statute of frauds the objection is

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matter for plea and not for demurrer.—*Strouse v. Elting*, 110 Ala. 132.

Recitals in the minute entries are not proper evidence on appeal that exceptions were taken to rulings on the several motions assigned for error, and there being no bill of exceptions those assignments are without support.

Reversed and remanded.

TYSON, J., concurs in the result, but dissents as to the first point, being of the opinion that count 2 is in case and that there was no misjoinder.—*White v. Levy*, 91 Ala. 179; *City Nat. Bank v. Jeffries*, 73 Ala. 191.

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Action against Common Carrier for Loss of Goods.

1. *Liability of railroad company as common carrier and as warehouseman.*—When a railroad company receives goods for transportation, transports them to the point of destination and informs the consignee of their arrival and affords him a reasonable opportunity to remove them, its duty and liability as a common carrier cease, and if the goods are then left in its custody, its liability for subsequent loss or damage is that of warehouseman only.
2. *Same; same; when recovery can not be had on a claim against a railroad company as common carrier.*—In an action against a railroad company for the loss of goods, where the complaint declares against the defendant as a common carrier, a recovery can not be had upon proof of the loss which occurred after the defendant's duty and liability as a common carrier had terminated, and while the goods had been left in its custody as a warehouseman.
3. *Action against railroad company as bailee; burden of proof.*—In an action against a railroad company to recover for the loss of goods, under a count which seeks to recover against the defendant as a voluntary bailee, the burden is upon the plaintiff to show negligence on the part of the defendant; and in

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the absence of proof showing negligence, the plaintiff is not entitled to recover.

APPEAL from the Circuit Court of Bibb.

Tried before the Hon. JOHN MOORE.

This action was brought by the appellant against the appellee. The complaint contained two counts. In the first count the plaintiff claimed \$100 for that upon a specified day the defendant received at Nashville, Tenn., six stoves to be delivered at Blocton, Alabama, and it was then averred in said count that the defendant undertook to deliver the stoves but the same were destroyed at Blocton, Alabama, while in the charge of the defendant as a common carrier. In the second count it was alleged that "The defendant had in its possession and under its control for the use and benefit of the plaintiff the following property, to-wit, six stoves, of the value of, to-wit, one hundred dollars. That the defendant so negligently and carelessly conducted itself in the possession and control of said property that the same was destroyed by fire to the plaintiff's loss as aforesaid, hence this suit."

The defendant pleaded the general issue, and the cause was tried upon an agreed statement of facts, which was substantially as follows: The stoves were transported from Nashville, Tenn., to Blocton, Ala., and consigned to the plaintiff. Defendant notified the plaintiff of the arrival of the stoves and the plaintiff went immediately to the depot of the defendant in order to get the stoves. On inspecting them he found that three were badly broken and of no value. Thereupon the plaintiff demanded the stoves that were not broken, and refused to take those that were injured. The defendant refused to deliver any of the stoves unless all of them were delivered. About two weeks thereafter the depot at Blocton, wherein the stoves were stored, was burned and all of the stoves were destroyed. The cost price of the stoves was \$89, and the market price at Blocton was \$100. The bill of lading was introduced in evidence, and was such a one as is usually given by railroads for the transportation of freight.

Upon the introduction of all the evidence the court rendered judgment for the defendant. From this judg-

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ment the plaintiff appeals, and assigns as error the rendering of judgment in favor of the defendant.

J. M. McMASTER and A. L. ARNOLD, for appellant.

J. M. FALKNER, *contra*, cited *A. G. S. R. R. Co. v. Grabfelder*, 83 Ala. 200; *S. & N. R. R. Co. v. Wilson*, 78 Ala. 587; *Kennedy v. M. & G. R. R. Co.*, 74 Ala. 430; *L. & N. R. R. Co. v. McGuire*, 79 Ala. 396.

DOWDELL, J.—The case was tried by the court without the intervention of a jury, and a judgment was rendered in favor of the defendant. There are only two assignments of error, both of which relate to the judgment rendered. No exception was taken to the judgment in the court below, so far as the bill of exceptions shows, and the exceptions if any were taken and reserved should be shown by the bill of exceptions. This being so, there is nothing in the record upon which to base the assignment of error. It may be said, however, that the judgment appealed from was properly awarded under the pleadings upon the agreed statement of facts on which the case was tried.

The first count in the complaint declared against the appellee as a common carrier. Under the agreed statement of facts the liability, if any, of appellee was that of warehouseman and not common carrier.—*Ala. Gr. So. R. R. Co. v. Grabfelder & Co.*, 83 Ala. 200; *Kennedy v. M. & G. R. R. Co.*, 74 Ala. 430; *L. & N. R. R. Co. v. McGuire*, 79 Ala. 396.

The second count, if it is good for any purpose, seeks a recovery against the defendant as a voluntary bailee. Under this count, the burden of proof was on the plaintiff to show negligence which was averred. The record does not show that any evidence was offered to support the averments of negligence.

We find no error in the record, and the judgment is affirmed.

[Glass & Co. v. Haygood.]

Glass & Co. v. Haygood.*Bill in Equity to cancel Mortgage on account of Duress.***1. Duress of goods; when party entitled to cancellation of contract.**

When the possession of one's goods is unlawfully held against him, and he has such an important, urgent and immediate occasion for their possession and use as can not be subserved by a resort to the courts to recover them, he may avoid any contract he enters into with the wrongdoer, in order to regain possession of his goods; the duress of the goods under such circumstances rendering the contract invalid.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. W. L. PARKS.

The bill in this case was filed on June 12, 1900, by the appellants, C. R. Glass & Co., against the appellee, J. C. Haygood. The bill averred that the complainants, a partnership, were engaged in the business of conducting a public laundry in the city of Montgomery; that for the necessary conduct of its business they owned and were compelled to keep several horses and wagons for the purpose of carrying the clothes of their customers to and from the laundry; that it was especially necessary that said horses and wagon should be at the use of complainants, and this was well known to defendant; that the defendant had kept for some time their horses and wagons at the livery stable owned and operated by the defendant; that on the morning of Monday, the 14th day of May, 1900, the employees of complainant, as was their custom and duty, went to the livery stable of the defendant to get the horses and wagons for the purpose of collecting from the customers of the complainant the clothing to be laundered; that the defendant refused to permit the employees of the complainant to get said horses and wagons, claiming that he held them for a debt which he alleged to be due from the complainant for the board of said horses; that one of the members of the complainant partnership protested with the defendant against the claim of the indebtedness and

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stated to the defendant that he did not owe more than \$25, which he offered to pay; that the defendant refused to accept this amount, or to accept any amount, except the sum of \$273.63, which was the amount the defendant claimed was due from the complainant, and would not allow the complainants to get their horses and wagons except upon the condition that said amount be paid.

The bill then averred as follows: "That the said Glass (one of the complainants) well knowing the utter insolvency of said Haygood and knowing that the business of the complainants would be ruined if they could not at once get the said horses and wagons out and sent around on their usual trips to their customers, and well knowing that complainants could not, by process known to the law, get possession of said horses and wagons in time to prevent the ruin of their business, and acting under the duress and fraud of the defendant thereupon, and on defendant's demand, paid him the sum of twenty-five dollars in cash and executed and delivered to the defendant a mortgage and two notes for the aggregate sum of two hundred and forty-eight dollars, the said mortgage being to secure the said notes and purporting to convey to the defendant said horses and wagons. One of the said notes for one hundred and twenty-five dollars is due and payable on the 14th day of June, 1900, and the other for a like sum due and payable on the 14th day of July, 1900. That the defendant is now in the possession of the said notes and has filed the said mortgage for record in the office of the probate judge of Montgomery county, Alabama. Orator aver that the said Glass, as partner in said firm, had no power to sell or mortgage any other than his own individual interest in the said horses and wagons which are the property of said partnership. And orators aver that said notes and mortgage were obtained by the defendant by fraud and duress, as aforesaid."

The complainants then averred in the bill facts going to show that after having paid the sum of \$25, they were not indebted to the defendant except in the small amount of 60 cents, which they then averred they had

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tendered to the defendant, but which was refused by him. After averring further that the defendant was wholly insolvent and that nothing could be made out of him by suit at law, the complainants further averred: "That they are wholly without any legal remedy in the premises; that unless restrained by an injunction or other restraining order the said defendant will undertake to seize, under the power contained in the said mortgage, the said horses and wagons and that he threatens to do this unless these complainants pay the full amount of the face of said notes. Complainants attach hereto a copy of said mortgage, marked Exhibit A, and made a part of this bill."

The complainants submitted themselves to the jurisdiction of the court, and offered to do all that the court might in equity and good conscience require of them. J. C. Haygood was made the sole party defendant.

The prayer of the bill was that said Haygood be enjoined from collecting the notes and foreclosing the mortgage given to secure them, and that the said mortgage and notes be required to be cancelled and delivered up. To this bill the defendant demurred upon the following grounds: "1. The said bill of complaint does not state in what the fraud consisted. 1½. The bill of complaint shows on its face that C. R. Glass had the right to mortgage the horses and wagons described in the mortgage. 2. The bill of complaint does not state in what the duress consisted. 3. The said bill of complaint states the conclusion of the pleader. 4. The said bill of complaint does not show how the duress or fraud was committed, but only states that duress and fraud was committed. 5. The said bill of complaint does not sufficiently state facts which constitute fraud or duress. 6. The bill of complaint shows upon its face that the complainant had a remedy at law. 7. The bill of complaint only shows that the complainants would have been inconvenienced, but does not show either duress or fraud. 8. The bill of complaint shows that the complainant has waived any duress or fraud by failing to take any action on the cause until too late." There was also a motion made to dismiss the bill for the want of equity, and another motion made to dis-

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solve the injunction for the want of equity in the bill.

On the submission of the cause upon the demurrers and motions the chancellor sustained each of them and ordered the bill dismissed and the injunction dissolved. From this decree the complainants appeal, and assign the rendition thereof as error.

GORDON MACDONALD, for appellant, cited *Ferguson v. Winslow*, 34 Minn. 384; *DeGraff v. Ramsey County*, 46 Minn. 319; *State v. Nelson*, 41 Minn. 25; *Mearkle v. Hennepin County*, 44 Minn. 546; *Oceanic S. Nav. Co. v. Tappan*, 16 Blatch. 297; *Joannin v. Ogilvie*, 15 L. R. A. 376, which cites the foregoing; *Brummagim v. Tillinghast*, 18 Cal. 265; *Radich v. Hutchins*, 95 U. S. 210; *Preston v. Boston*, 12 Pick. 7; *Dakota County Commissioners v. Parker*, 7 Minn. 267; *Frazer v. Pendleberg*, L. J. C. P. 1; *Pemberton v. Williams*, 87 Ill. 15; *Close v. Phillips*, 7 Man. and C. 586; *White v. Heylman*, 34 Pa. 142.

HILL & HILL, *contra*, cited *Davis v. Rice*, 88 Ala. 388; 10 Am. & Eng. Ency. Law (2d ed.), 337; *Lynn v. Waldo*, 36 Mich. 347; *Lynch v. Sauer*, 16 Misc. Rep. 1; *Lehman v. Shackelford*, 50 Ala. 437; *Long v. Slade*, 121 Ala. 269; *Crommelin v. McCauley*, 67 Ala. 542.

McCLELLAN, C. J.—“Whenever a conveyance or contract is obtained by actual duress, equity will grant relief, defensively or affirmatively, by cancellation, injunction, or otherwise as the circumstances may require. In determining what constitutes duress—what force or threats—equity follows the law.”—2 Pomeroy’s Eq. Jur., § 950. “Under the common-law rule, an act could be avoided for duress *per minas* only when the threatened danger to avoid which it was done was either loss of life, loss of a member, mayhem, or imprisonment. The avoidance of an act for duress *per minas* was said by the old authorities, still adhered to by the English courts, to have been limited to these cases because the law afforded an adequate redress for the infliction of any other injuries, and for this reason

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a threat to commit any of them was insufficient to overcome the will of a reasonably firm man. * * *

The rule at common law, and that prevailing in England, and probably some of the United States, is that the unlawful detention, or the unlawful actual or threatened seizure of a person's goods does not ordinarily constitute duress which will enable him to avoid a contract made for the purpose of preventing the seizure or of effecting their release from unlawful detention."—10 Am. & Eng. Ency. Law, pp. 324, 344-5.

The foregoing are accurate statements, so far as they profess to go, of the law except that it seems to be settled in England at least that there can be no "duress of goods" under any circumstances which will enable the owner to avoid a contract made to secure their release or immunity from unlawful seizure. And this view was expressed by SAFFOLD, J., harking back to Bacon's Abridgment, in *Lehman v. Shackelford*, 50 Ala. 437, where he says: "As to the second charge, there is nothing in the testimony tending to show duress, which relates to fear of imprisonment, mayhem, loss of life, or of a member. Menacing to commit a battery, or to burn one's house, or to spoil his goods, is not sufficient to avoid his act. For if he should suffer what is threatened, he may sue and recover damages in proportion to the injury done." The ruling made might better have been rested on the consideration that there was no evidence of an unlawful seizure, nor of a threatened and imminent unlawful seizure of the goods of the party who did the act from the supposed consequences of which he was seeking to shield himself on the ground that he acted under duress; and therefore what we have quoted from the opinion is in the nature of a *dictum*. We have not been referred to and we are not aware of any other Alabama case which by way of *dicta* or otherwise tends to support the strict English rule. And it is laid down in the Encyclopedia that "In the United States there is one universally recognized exception to the old common-law rule. In those cases where the contract may be made to prevent the impending destruction of the property, and no ready and adequate redress may be had if the impending destruction is consummated, the

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contract may be avoided for duress.”—10 Am. & Eng. Ency. Law, p. 345. Among the cases cited by this text, is that of *Foshay v. Ferguson*, 5 Hill (N. Y.), 154. In that case the court, after referring to the common-law rule, said: “But Mr. Chitty very justly doubts whether such be the rule at the present day, especially in regard to so serious an injury as a threat to burn a man’s house. * * * I do not intend to say that a man can avoid his contract on the ground that it was procured by an illegal distress of goods; but I entertain no doubt that a contract procured by threats and the fear of battery, or the destruction of property, may be avoided on the ground of duress. There is nothing but the form of a contract in such a case, without the substance. It wants the voluntary assent of the party to be bound by it. And why should the wrongdoer derive an advantage from his tortious act? No good reason can be assigned for upholding such a transaction.” So in *Spaids v. Barrett*, 57 Ill. 289, s. c. 11 Am. Rep. 10, the goods were oysters, which being of a perishable nature required special care. They were wrongfully taken and kept from the owner by means of a writ of attachment fraudulently obtained, and the person detaining them refused to surrender them unless an amount greatly in excess of what the owner owed to him was paid, exacting also from the owner a release of all damages which might have been sustained by the wrongful attachment; and where the owner in order to obtain possession of the oysters, paid the sum demanded and executed such release, the court held in an action for wrongfully suing out the attachment that the release might be avoided for duress. Other cases and texts have carried the doctrine of duress of goods still further. Thus the Supreme Court of Michigan, by COOLEY, J., has declared that duress of goods may exist when one is compelled to an illegal exaction in order to obtain them from one who has them and refuses to surrender them unless the exaction is endured, and that where the exaction is the making of a contract, the contract may be avoided.—*Hackley v. Headley*, (45 Mich. 569); and the same rule is laid down in Cooley on Torts, 506-7, as

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follows: "Duress is either of the person or of the goods of the party. * * * Duress of goods consists in seizing by force or withholding from the party entitled to it the possession of personal property, and extorting something as the condition for its release, or in demanding and taking personal property under color of legal authority, which, in fact, is either void or for some other reason does not justify the demand." So in Georgia it is held that, "The seizure of property by force, and holding it until the owner executes promissory notes for its release, without the semblance of a consideration, is a species of duress, and a court of equity will relieve the maker by preventing a collection of the notes."—*Crawford v. Cato*, 22 Ga. 594. The Supreme Court of Florida, following and reiterating the doctrine as declared by Judge COOLEY, says further: "The authorities are abundant in support of the proposition that where a party has possession and control of the goods of another and refuses to surrender them except upon compliance with an unlawful demand, and there is no other speedy way left the owner of extracting them and saving himself from irreparable injury, but by paying money or giving a note, his doing so will be regarded as done under compulsion."—*Fuller v. Roberts*, 35 Fla. 110. The Court of Appeals of Kentucky also holds that there may be duress of goods which will avoid a note and mortgage executed by the owner to recover possession unlawfully withheld. The case was this: A creditor fraudulently obtained possession of his debtor's horse, and by refusing to surrender possession compelled him to execute a note for thirty or forty dollars more than was owed, and to execute a mortgage on the horse to secure the payment of the note. The creditor in due time filed a petition to foreclose said mortgage, and relief was denied on the ground that the execution of the paper had been secured by duress of the mortgagor's goods, and that it was, therefore, void. The creditor resorted to deceit and trickery in obtaining the possession of the horse, and having reference to this, something is said in the case about *fraud*: but such fraud only operated in the case by way of emphasizing the unlawful character of the creditor's pos-

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session, so that the case was decided in reality solely upon the ground that the defendant in the foreclosure proceeding was forced to sign the mortgage by duress of his goods. The court said: "In *Spaids v. Barrett*, (57 Illinois, 289), the court substantially held that there was no difference between the rule of law that held a contract might be avoided by reason of the duress of the person when entered into, and the one that avoided a contract for duress of the goods of the person entering into it, because the court says that in either the contract is not voluntary, but made through compulsion," and upon the authority of that case and *Foshay v. Ferguson*, *supra*, the Kentucky court concludes with respect to the case before it: "We are of opinion that the entire contract was obtained by force, and was tainted with fraud, and therefore void."—*Lightfoot v. Wallis*, 12 Bush, 498. The St. Louis Court of Appeals announces the same principle thus: "The rule now is that duress in its legal sense exists when there is an arrest of the person or seizure of the goods, or a threat or attempt to do one or the other."—*Clafin v. McDonough*, 33 Mo. 412; *Vyne v. Glenn*, 41 Mich. 112; *Fout v. Geraldin*, 64 Mo. App. 165. Defendant attempted to show that the mules belonged to him; that Black had no authority to dispose of them; that the plaintiff refused on demand to give them up, and that he, defendant * * * signed the note in order to get possession of them. If such are the facts, it must be held that he signed the note under duress; for duress of goods exists when the owner is compelled to submit to an extortion in order to obtain possession of them from one who detains them without lawful right or excuse."—*Wilkerson v. Hood*, 65 Mo. App. 491. And to the same effect the doctrine has been declared by the Supreme Court of Indiana: "No recovery can be had upon a note which the maker was induced to give either by duress of his person or to regain possession of his property unlawfully withheld. 'A contract made by a party under compulsion is void; because consent is of the essence of the contract, and when there is compulsion there is no consent, for this must be voluntary.'—1 Pars. Con. (5th ed.) 392, After

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noticing the English law of duress the same author lays down this general principle: "These distinctions, however, would not now probably have a controlling power in this country; but where the threat whether of mischief to the person, or the property, or the good name, was of sufficient importance to destroy the threatened party's freedom, the law would not enforce any contract which he might be induced by such means to make."—*Bennett v. Ford*, 47 Ind. 264. And so in South Carolina: "Duress of goods, or of negroes, is a good plea to a bond given to procure their release," etc. *Collins v. Westbury*, 2 Bay, 211. In Texas it is held that "a contract made in order to regain possession of property unlawfully detained may be avoided on the ground of duress," the Supreme Court after referring to the English rule, continuing: "But at an early day a contrary ruling was made in this country. In 1797 the Supreme Court of South Carolina, in the case of *Sarportus v. Jennings*, 1 Bay, 470, held that a contract made in order to obtain possession of goods unlawfully detained could not be enforced. In *Collins v. Westbury*, 2 Bay, 211, the same court reaffirmed the doctrine. Since that time the doctrine has frequently been applied in numerous decisions in our State courts. * * * The weight of American authority is in favor of the doctrine that detention of goods under certain circumstances may constitute duress, and we think it is in accordance with the better reason."—*Oliphant v. Markham*, 79 Tex. 543; s. c. 23 Am. St. Rep. 263.

Some of the cases above referred to take no note of a distinction in England and in some of the United States between cases where *money is paid* to secure possession of goods unlawfully withheld from the owner, and cases where a note or other form of obligation is given by the owner to regain possession of goods so detained. This is not surprising. When the matter is attentively examined, the wonder is, not that these courts have taken no heed of such supposed distinction, but that any court ever did. In the former class of cases all the courts, English and American, hold that money so paid may be recovered in an action of *indebit-*

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atus assumpsit proceeding on the theory that the payment is *involuntary*, as the English courts seems to make a point of expressing it, or under *duress of goods*, as it really is, whether expressed by the word "involuntary" or not, and as the American courts generally express it. And we are utterly unable to conceive any ground for allowing recovery of money so paid, which would not upon every consideration possible of obtaining in the premises, go in the same degree to support a defense to a note or other contract entered into to regain possession of goods unlawfully withheld. For example: A. unlawfully withholds the goods of B. He proposes to B. to surrender the possession if B. will either pay him one hundred dollars or will execute to him a promissory note at one day for that sum. If B. elects to pay the money all the cases hold that he may recover it back, the English courts on the ground that the payment was *involuntary*, the American because it was made under *duress*. But if B. elects to execute his note, he can, according to the English cases, be made to pay the one hundred dollars on the next day, because the note was not made under duress, but *voluntarily*. It is to us an impossibility to comprehend this distinction. And when we go to the statement of the alleged grounds attempted by some English judges, we are but confirmed and reassured that it does not and cannot exist at all. The case of *Atlee v. Backhouse*, 3 M. & W. 632, is generally cited and put forward as stating the grounds upon which the English courts deny the analogy between money paid and a contract made to obtain the release of goods wrongfully withheld. That was decided by the Court of Exchequer, composed of five judges. Four of the five made deliverances. The chief baron, Lord ARINGER, seems to go upon the theory that unless goods wrongfully seized are seized *for the purpose* of enforcing the payment of money, money paid for their release cannot be recovered back, and that in the case in hand the seizure was not made for the purpose of enforcing the payment of money. It requires no argument to demonstrate that this is not and never was the law: It is wholly immaterial what ac-

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tuates the unlawful seizure of another's property. And if it had been the law, it would have had no application in that case because the seizure was made to enforce the payment of penalties claimed to have been incurred by the owner under the excise laws. BARONS BOLLAND and GURNEY did not touch upon the question we have in hand; and it was thus left to Baron PARKE to set forth the distinction in question and the reasons for it. And thus he went about it: "There is no doubt of the proposition laid down by Mr. Erle, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of *duress*, because I think that the law is clear, although there is some case in Viner's Abridgment to the contrary, that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down in Sheppard's Touchstone, (p. 61)—but the ground is that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back; but if while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress." The lameness and impotency of this statement is painfully obvious. In it the learned judge assumes the validity of the contract which was the question and the only question litigated in the case. Of course, if one to recover the possession of his goods unlawfully withheld makes a *binding* contract, why the contract is binding—that's all; and there is an end of his suit, brought on the theory that the contract is *not* binding. But this assumption of the judge is a minor and perhaps an inadvertent infirmity in his argument. In other respects it is inconsistent and self-contradictory on its face, and essentially so in law. He declares that such payment is not a payment under duress at all, but that it is a payment under a *species of duress*. We are not aware that there are different

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species of duress apportionable to this and to that act into which a party is illegally coerced, or that that sort of duress which constrains a party to pay money to recover his goods is a different sort of duress from that which constrains him to promise to pay money to recover his goods. We have had and now have the notion that anything done by one party which illegally constrains the other to an act against that other's will is duress; and to say that an act is not avoided by duress but is avoided because it is not *voluntarily* done, is a patent contradiction in terms. The learned judge while undertaking to declare that a payment of money under the circumstances named is not a payment made upon duress of goods, has in fact declared that it is a payment under duress, and for that reason recoverable. All the American courts dealing with this subject have put the ground of such recovery expressly upon duress, actual or threatened, of goods, this court among them (*Baister v. Athens*, 66 Ala 194); and there is no other ground upon which it can be rested. This doctrine of recovery of money paid under duress being thoroughly established and proceeding upon a principle which palpably applies fully as well and cogently to contracts made upon duress of goods, cannot logically be excluded from application to such contracts. The Supreme Court of Pennsylvania after adverting to the well established right to recover back money paid under duress of goods, proceeds: "If, therefore, such be the case, where the money has been actually paid, *a fortiori* is such a defense available in an action upon a promissory note extorted from the owner of goods unlawfully withheld to obtain possession of them."—*White v. Heylman*, 34 Pa. St. 142, 145. We fully approve the language of Judge GAINES in *Oliphant v. Markham*, *supra*: "Notwithstanding the doctrine of the English courts [that there is no such thing as duress of goods], it is well settled by them that money paid in order to get possession of goods unlawfully detained may be recovered back. The two rules recognized by the courts of England, it seems to us, lead to an obvious absurdity; that is to say, when one pays money in order to obtain

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possession of his goods unlawfully obtained by another, he may recover it back; but if he gives his note under the same circumstances and for the same purpose he cannot resist its payment."—79 Texas, 543.

The exigencies of this case do not require us to decide whether in all cases where a contract is made to recover possession of goods unlawfully withheld from the owner, such contract may be avoided for duress. But upon the authorities and considerations to which we have adverted, we do hold, confining ourselves to the case before us, that when the possession of one's goods is unlawfully held against him, and he has such an important, urgent and immediate occasion for their possession and use as cannot be subserved by a resort to the courts to recover them—"such an immediate want of his goods, that an action of trover [or detinue] would not do his business."—*Astley v. Reynolds*, 2 Strange, 916—he may avoid any contract he enters into with the wrongdoer in order to regain possession of them. The bill of complaint brings this case within this ruling. It shows an equity in the complainants to have the note and mortgage executed by them to the respondent to regain possession of their horses and wagons, cancelled and avoided; and the chancellor erred in dismissing it for want of equity. The bill is perhaps faulty in some respects—as, for instance, in not positively averring with more particularity the immediate injury that would have ensued to complainants' business from the longer detention of their property by the respondent—but it is not open to any of the objections taken by the demurrer. That should have been overruled.

The decree of the chancery court is reversed, and a decree will be here entered overruling the demurrers and denying the motion to dismiss for want of equity.

Reversed and rendered.

[*Baker et al. v. Carraway.*]**Baker et al. v. Carraway.***Statutory Action of Ejectment.*

1. *Ejectment against receiver; can not be maintained without consent of court making appointment.*—Where a receiver, in obedience to an order of the court appointing him, goes into possession of land and holds it subject to the control of the court, a third party claiming to be the owner of said land and who was ousted by the receiver, can not maintain an action of ejectment against such receiver to recover possession of the land, without the consent or order of the court by which the appointment was made.

APPEAL from the Chancery Court of Geneva.

Heard before the Hon. WILLIAM L. PARKS.

This was a statutory action of ejectment, brought by the appellee against the appellants, Joe Baker, Jr., and A. W. Deshazo.

On the trial of the cause, it was shown that the plaintiff executed the mortgage to the defendant Joe Baker, Jr., intending to include therein the property involved in the present suit; that upon default being made in the payment of the mortgage debt, said Joe Baker, Jr., filed a bill in the chancery court of Geneva county, seeking to have the mortgage reformed, so as to include the lands sued for and to have the same foreclosed, and in said bill asked for the appointment of a receiver who should take possession of said lands as an officer of the court, and rent them, collect the rents, etc., until said foreclosure was disposed of.

At the time of the filing of said bill, the plaintiff in the present suit was in possession of said lands. A receiver was appointed, who, under an order of the court ousted the plaintiff and took possession of said lands, and by virtue of the authority of the decree appointing him, such receiver rented the land to the defendant Deshazo, who went into possession of said lands as the

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tenant of the receiver. While the foreclosure suit was still pending, the present action of ejectment was brought. The other facts of the case are sufficiently stated in the opinion.

The court at the request of the plaintiff gave the general affirmative charge in his behalf. The defendants duly excepted to the giving of this charge, and also separately excepted to the court's refusal to give the general affirmative charge requested by them.

There were verdict and judgment for the plaintiff. The defendants appeal, and assign as error the giving of the general affirmative charge requested by the plaintiff, and the refusal to give the general affirmative charge requested by the defendants.

ESPY, FARMER & ESPY, for appellants.—A receiver can not be ousted by suit in another court without permission of the court appointing such receiver.—*Southern Granite Co. v. Wadsworth*, 115 Ala. 570; *Steele v. Walker*, 115 Ala. 485; *Turrentine v. Blackwood*, 125 Ala. 436; *Kyle v. Swem*, 99 Ala. 573; *Smith on Receivers*, pp. 182-83; *Fort Wayne Ry. Co. v. Mellett*, 92 Ind. Rep. 535.

R. H. WALKER, *contra*, cited *Bernstein's case*, 60 Ala. 582; *Reddick v. Long*, 27 S. Rep. 402; *Sharp v. Robinson*, 76 Ala. 343; *Johnson v. Cook*, 73 Ala. 537.

TYSON, J.—In January, 1901, the plaintiff being in possession of the land here sought to be recovered, was turned out of possession by a receiver under and by virtue of the authority of the decree appointing him, and the defendant Deshazo went into possession of it as the tenant of the receiver. This action was brought on the 23d day of February following. The decree of the chancellor appointing the receiver directed him to take possession of this land and to rent it. This decree was rendered in a cause seeking the subjection of this land to a mortgage lien, of which the court is shown to have and exercised jurisdiction. The single question presented is whether the plaintiff can maintain this suit, without first obtaining the consent or order of

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the court, by which the appointment of the receiver was made, to institute it. That she cannot do so, is too well settled to be now a matter of disputation, unless section 803 of the Code changes the rule.—*Southern Granite Co. v. Wadsworth*, 115 Ala. 570; *Steele v. Walker*, *Ib.* 485; *Turrentine v. Blackwood*, 125 Ala. 436; *Kyle v. Swem*, 99 Ala. 573; *The Ft. Wayne R'y. Co. v. Mellett*, 92 Ind. 535. A cursory reading of the statute is sufficient to show that it contains no authorization of the bringing of a suit against a receiver for the *corpus* of the estate, the management of which is intrusted to him by the court as its officer, without leave of the court appointing him, whatever may be the extent of the authorization conferred as to bringing suits against him in respect to any act or transaction of his, in carrying on the business connected with such property. It is scarcely necessary to say that the possession of the defendant Deshazo was the possession of the receiver. The affirmative charge requested by defendant should have been given.

Reversed and remanded.

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Bill in Equity for Cancellation of Deed as Cloud on Title.

1. *Duress as ground for equitable relief.*—Duress employed to procure a conveyance of property, although a species of fraud, is not of itself a ground for equitable interference.
2. *Landlord and tenant; attornment to third person; right of stranger to maintain bill.*—The attornment of a tenant to any other person than his landlord, does not, of itself, destroy the possession of the landlord; and when the possession of the rented premises is tortiously or otherwise gained from the tenant, a court of equity will not, on such possession, entertain a bill at the instance of the tort-feasor, or the

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person attorned to, to remove a cloud from his title to the rented premises.

3. *Same; same; same.*—Where a person enters into possession of land as grantee under a deed alleged to have been obtained by duress and fraudulent representations, and leases said premises, the fact that the grantor in said deed subsequently secured the tenants of the grantee to attorn to her and made a contract agreeing to rent said lands to said tenants, does not give said grantor such a possession as will authorize him to maintain a bill in equity to have said deed cancelled and removed as a cloud from her title.

APPEAL from the Chancery Court of Geneva.

Heard before the Hon. W. L. PARKS.

The bill in this case was filed by the appellant, Fannie O. Treadwell, against the appellee, C. C. Torbert. It was averred in the bill that on June 27, 1895, the complainant executed to the defendant a deed in which she conveyed certain lands specifically described; that said deed was procured from the complainant by the defendant by fraud and duress and by unlawful acts on the part of the defendant; that prior to the execution of said deed the defendant instituted a prosecution against H. P. Treadwell, the husband of the complainant, by making an affidavit before a justice of the peace charging him with obtaining a large sum of money by false pretenses; that there was no ground for said prosecution; that said Treadwell had not obtained money by false pretenses as charged, and that the prosecution was commenced by the defendant for the express purpose of extorting from the said H. P. Treadwell or the complainant the deed to the property described; that immediately after the arrest and while Treadwell was under bond for his appearance, the defendant commenced to make propositions of compromise and finally proposed to the complainant that if she would execute a deed to the lands described in the bill that he would dismiss said prosecution, at the same time representing to her that if this was not done her husband would be convicted of the offense charged, and would be sent to the penitentiary; that by reason of said fraudulent representations and of the duress incident thereto, the complainant was induced to execute said deed to the

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defendant. It was then further averred that said charge was absolutely false, and that although the deed expressed a consideration of \$1,500, no consideration was paid whatever, and that said deed was obtained from the complainant by reason of the representations and duress as stated. It was then alleged in the bill that the complainant was, at the time of the filing of the bill, in the possession of the property described in the bill and conveyed in said deed.

The prayer of the bill was that said deed be cancelled as a cloud upon the complainant's title. The other facts of the case necessary to an understanding of the decision on the present appeal, are sufficiently stated in the opinion.

On the final submission of the cause on the pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed for, and ordered the bill dismissed. From this decree the complainant appeals and assigns the rendition thereof as error.

MULKEY & MULKEY, for appellant, cited *Treadwell v. Torbert*, 119 Ala. 279; *Vincent v. Walker*, 93 Ala. 165; *Burke v. Taylor*, 94 Ala. 130; *Topley v. Topley*, 88 Am. Dec. 76; *Eadie v. Shiman*, 82 Am. Dec. 395; *U. S. v. Huckabee*, 14 Wall. 432; 5 Am. & Eng. Ency. of Law, 430; *Rea v. Longstreet*, 54 Ala. 291; *Daniel v. Stewart*, 55 Ala. 276; *Lockett v. Hurt*, 57 Ala. 188; 3 Brickell's Dig. pp. 355-6; *Phelps v. Zuschlag*, 34 Tex. 371; *Baker v. Morton*, 12 Wall. (U. S.) 150; *Hackley v. Headley*, 45 Mich. 569; *First Nat. Bank v. Watkins*, 21 Mich. 483; *Briggs v. Lewiston*, 29 Me. 472; *McMurtrie v. Keenan*, 109 Mass. 185.

G. P. HARRISON, J. J. MORRIS and C. D. CARMICHAEL, *contra*.—Complainants' possession was tortious; hence she can not maintain suit to remove cloud from her title.—*Hamilton v. Adams*, 15 Ala. 596; *Turnley v. Hanna*, 67 Ala. 101; *Fleming v. Moore*, 122 Ala. 399; *Rogers v. Boynton*, 57 Ala. 501; *Campbell v. Davis*, 85 Ala. 56; *Tomlinson v. Watkins*, 77 Ala. 399; *Peeples v.*

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Burns, 77 Ala. 290; *Thorington v. City Council of Montgomery*, 82 Ala. 591.

SHARPE, J.—In controversies involving merely disputed questions of fact affecting title to land freed from matters calling specially for relief in equity, the right of trial by jury prevails, and for the settlement of such disputes courts of law afford the appropriate remedies. Duress when employed to procure a conveyance of property is a species of fraud, and is not of itself a ground of equitable jurisdiction. Hence, one who would sue only to avoid his deed to lands by fraudulent practices, and whose asserted title and estate are such as would support ejectment, cannot bring his case under the jurisdiction which exists in equity to cancel deeds and uncloud titles, unless he is in possession of the land and is so disabled to sue in ejectment.—*Peebles v. Burns*, 77 Ala. 290.

Nor will possession gained by a wrong to his adversary serve in such case to give a complainant standing in equity, for equity will not so encourage unfairness; and consequently this court has held unavailing to a complainant, a possession obtained by having tenants of his adversary attorn to him, because in so doing the complainant cooperated with the tenants in violating the duty they owed their landlord, of surrendering to him possession at expiration of the lease.—*Fleming v. Moore*, 122 Ala. 399; *Campbell v. Davis*, 85 Ala. 56.

In the present case the main facts relating to possession as we find them from the evidence are as follows: Soon after the deed in question was executed, defendant was let into the possession of the property it conveyed and which consisted mainly of farm lands, though two town lots were included. The lots were vacant and no acts of ownership over them are shown to have been done by either party except that defendant has paid taxes on them and offered them for sale. Defendant rented the farm lands in 1896 and 1897 to a tenant who cultivated part and sub-let the remainder of what he had rented. In 1898 this tenant refused to surrender the lands to defendant and suffered the sub-

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tenants to remain thereon. The possession of these lands on which complainant relies, is such only as she holds by virtue of a contract whereby she agreed to rent the land to those persons who had previously rented from defendant's tenant, and through the occupation of those persons as her tenants.

The duty of surrendering possession at the end of the rental term rests on the sub-tenant no less than on the first tenant.—*Russell v. Erwin*, 38 Ala. 44; 18 Am. & Eng. Ency. Law, 403. Complainant, by contracting with them for their continued occupation, encouraged them to violate that duty; and in doing so was culpable in no less degree than if they had been the original tenant.

The principle applied in *Fleming v. Moore*, *supra*, governs this case; and under it the decree will be affirmed.

Montgomery Street Railway Co. v. Mason.

Action against Street Railway Company by Passenger to recover Damages for Personal Injuries.

1. *Pleading and practice; when error in rulings of trial court upon the pleadings will not work reversal.*—Unless it affirmatively appears that the refusal of a trial court to strike immaterial and irrelevant averments from the complaint results in injury to the defendant, such refusal, although erroneous, does not constitute a reversible error.
2. *Same; when error in ruling upon motion to strike certain portions of the complaint without injury.*—Where, in an action to recover damages for personal injuries, the defendant moved to strike certain parts of the complaint as being immaterial averments and merely surplusage, which motion the court overruled, and after such ruling on the part of the court the plaintiff amends the complaint by striking out the part thereof to which the motion to strike was directed, no

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injury results to the defendant in overruling the motion, and such ruling by the trial court, although erroneous, does not constitute a reversible error.

3. *Action against street railway company; sufficiency of complaint.*

In an action against a street railway company by a passenger to recover damages for personal injuries, a count of the complaint which, after averring that it was the duty of the defendant to provide proper and sufficient places for the plaintiff, one of its passengers, to alight from its cars, then avers that the defendant, without regarding said duty, "failed to provide proper and sufficient place for plaintiff so to alight," and stopped its car on which plaintiff was a passenger at a point where defendant had negligently placed certain lumber and debris within a few feet of its track, by reason whereof the plaintiff, while attempting to alight from said car, at said place, stepped and fell upon said lumber and thereby received the injuries complained of, sufficiently states a cause of action and is not subject to demurrer.

4. *Same; same.*—In such a case, a count of the complaint which avers that it was the duty of the plaintiff to use proper care to have its car stopped at the usual place provided for passengers to alight at the station to which plaintiff was going, then avers that the defendant disregarding its said duty "did not stop said car at the usual stopping place where plaintiff could with safety have alighted from said car, although signalled by plaintiff in ample time to do so, but ran said car beyond said regular stopping place, a distance of about thirty feet, at a place where lumber and other obstructions were lying on the ground, and where there was no light to apprise plaintiff of the situation, and then and there stopped said car in the midst of said lumber," and plaintiff believing that said car had stopped at the usual place, attempted to alight therefrom and stepped and fell upon said lumber or other obstructions, among which the defendant had negligently and carelessly stopped said car, and thereby the plaintiff sustained the injuries complained of, states a sufficient cause of action, and is not subject to demurrer.

5. *Same; sufficiency of plea of contributory negligence.*—In an action by a passenger against a street railway company to recover damages alleged to have been sustained by him when alighting from one of the cars of the defendant, which injuries were alleged to have been sustained by reason of the defendant stepping in or upon a pile of lumber negligently placed by the defendant near its track, a plea which avers "that when the car stopped the lights from the car shone for

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ten or twelve feet on either side of the track, and that plaintiff could have seen the alleged lumber and debris before he stepped thereon, by the exercise of ordinary and reasonable care on his part," is insufficient as a plea of contributory negligence, in that it does not aver that the plaintiff failed to exercise ordinary and reasonable care, or that he saw the lumber.

6. *Same; same.*—In such a case, a plea which avers that the defendant "stepped from said car without knowing or inquiring of the defendant or its agent as to whether or not the situation was reasonably safe for him to alight where said car was stopped," is insufficient as a plea of contributory negligence, and is demurrable.
7. *Same; same.*—In such a case, a plea which alleged that the "plaintiff voluntarily alighted therefrom without requesting the defendant or his agent to carry him back to the regular stopping place, and without ascertaining before he alight from said car, that he was alighting at a safe place, is insufficient as a plea of contributory negligence and demurrable.
8. *Same; same.*—In such an action a plea seeking to set up contributory negligence on the part of the plaintiff which avers that the plaintiff boarded said car of the defendant knowing that it was being operated without any one to look after the safety of his alighting, and that he, plaintiff, "alighted from said car without first ascertaining or attempting to ascertain that he was at a safe place to alight therefrom," is insufficient and subject to demurrer.
9. *Street railroad company; duty as to passenger.*—Street railway companies are under a duty of exercising the highest degree of diligence and care to conserve the safety of their passengers, and this duty extends to and includes the safe landing of passengers at the termination of their journey or ride; and for failure to stop one of its cars at a place safe for a passenger to alight, or in stopping its car at a dangerous place, a street railway company is liable for damages sustained by a passenger by reason of such failure or by reason of a passenger alighting at such dangerous place.
10. *Action against street railway company; hospital fees paid by plaintiff recoverable; admissibility of evidence.*—In an action against a street railway company to recover damages resulting from personal injuries, hospital fees, including the expenses of a ward in a hospital and a nurse, paid by the plaintiff while seeking recovery from the injuries sustained, constitute an element of recoverable damages by the plaintiff; and such items of expense incurred by the plaintiff are admissible in evidence.

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11. *Deposition under the statute; should be suppressed when taken before only one of two named commissioners.*—Where, in a civil case, interrogatories are filed under the statute (Code, § 1835), and the commission issued by the clerk names two persons as commissioners, and the certificate attached to the deposition taken under said commission is signed by only one of the commissioners, and recites that he alone took the deposition of the witness to whom the interrogatories were propounded, and the adverse party is shown not to have waived the absence of the other commissioner, the taking of the deposition by only one of the commissioners was invalid, and upon a motion properly made, the deposition so taken will be suppressed; and this is true although it was not shown why the absent commissioner did not act, and there was no evidence that he did not have notice as required by the statute, but it was shown that the commissioner who acted was suggested by the party propounding the interrogatories and the name of the other commissioner was inserted in the commission upon the suggestion of the adverse party. (DOWDELL, J., dissenting.)
12. *Trial and its incidents; admissibility of evidence relating to the manner of arriving at verdict by jury on motion for a new trial.*—On a motion for a new trial, evidence by the jurors who tried a case as to the manner of their arriving at a verdict, is inadmissible in evidence.
13. *Damages for personal injuries; when not shown to be excessive.*
In an action against a street railway company, to recover damages for personal injuries, where it is shown that by reason of the injuries sustained the plaintiff's right arm was paralyzed and the injury resulted in his being sick and disabled for several months, and being subjected to heavy expenses for medical and hospital fees, and had suffered great mental and physical pain, and was prevented from performing the duties of his occupation for several months, a verdict assessing his damages at \$2,300 can not be said to be excessive.

APPEAL from the City Court of Montgomery.

Tried before the Hon. A. D. SAYRE.

This was an action brought by the appellee, James M. Mason, against the appellant, the Montgomery Street Railway Company, to recover damages for personal injuries. The complaint contained three counts, in each of which the plaintiff claims five thousand dollars damages. The first count of the complaint, after setting

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up the fact that the defendant was operating a street railway in the city of Montgomery, and that the plaintiff had taken passage upon one of the cars owned and operated by the defendant, then avers that the defendant received "said plaintiff as a passenger therein to be carried through Hull street to a certain station near Julia street and opposite to a church known as Hull Street Methodist church, at or near Jenetta Ditch, sometimes called Boguehomo ditch, *and that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed and propelled along the said railway as aforesaid,* (and to have provided a proper and sufficient place, light and means and facilities whereon and whereby the plaintiff might have safely alighted at said station opposite said church near said ditch; yet the said defendant not regarding its duties in that behalf did not use due and proper care in providing a proper and sufficient place, light and means and facilities to enable plaintiff safely to alight at said station opposite said church when the said car carrying plaintiff arrived there); by means whereof the said plaintiff, while attempting to alight or descend from the said car at said station, to-wit: on the 6th day of August last aforesaid, and at night, stepped and fell upon certain lumber and debris which had been negligently placed and permitted to remain at the place where plaintiff alighted from said car, and by stepping or falling upon said lumber or debris, plaintiff fell upon the same and was thereby greatly cut, bruised and wounded, and divers members of his body were then and there greatly injured in so much that his right arm was paralyzed and he then and there became and was very sick, weak and disabled for a long period, to-wit: from then to the commencement of this suit, and was thereby forced to pay a large sum of money for expenses incurred, to-wit the sum of \$1,000 in and about attempting to be cured of the bruises, weakness and injuries occasioned as aforesaid, and suffered and underwent great mental and physical pain, and was hindered and pre-

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vented from performing the duties of his occupation, which amounted to a large sum of money, to-wit, the sum of \$5,000."

The second count of the complaint, after making the prefatory allegations as contained in the first count, then alleged that the defendant received "the said plaintiff as a passenger therein to be carried through Hull street, to a certain station near Julia street, and opposite to a church known as Hull Street Methodist church, at or near Jennetta ditch, sometimes called the Buguehomo ditch, *and that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed and propelled along the said railway as aforesaid* (and to have provided a proper and sufficient place, light and means and facilities whereon and whereby the plaintiff might have safely alighted at said station opposite said church near said ditch; yet the said defendant not regarding its duties in that behalf, did not use due and proper care in providing a proper and sufficient place, light and means and facilities to enable plaintiff safely to alight at said station opposite said church, when the said car carrying plaintiff arrived there); but negligently and carelessly piled the lumber and debris of an old bridge on the public highway where defendant stopped said car for plaintiff to alight, by means whereof the said plaintiff, while attempting to alight or descend from the said car at said station, or the place where said car was stopped for plaintiff to alight, to-wit, on the 6th day of August last aforesaid, and at night, stepped and fell upon said lumber and debris which had been negligently placed and permitted to remain at the place where plaintiff alighted from said car, and by stepping or falling upon said lumber or debris, plaintiff fell upon the same and was thereby greatly cut, bruised and wounded, and divers members of his body were then and there greatly injured in so much that his right arm was paralyzed, and he then and there became and was very sick, weak and disabled for a long period," etc.

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The third count of the complaint, after making the prefatory allegations and alleging that the plaintiff had taken passage on one of the cars operated by the defendant, then continues as follows "and that thereupon it then and there became and was the duty of the said defendant to use due and proper care that the said plaintiff should be carefully and securely carried and conveyed and propelled along the said railway as aforesaid, and to be stopped at the usual and proper place provided for passengers to alight at said station opposite said church; yet the said defendant not regarding its duty in that behalf did not stop said car at the usual stopping place where plaintiff could with safety have alighted from said car, although signalled by plaintiff in ample time to do so, but carelessly and recklessly ran said car beyond said regular stopping place, a distance of about 30 feet, to a place where lumber and other obstructions were lying on the ground, and where there was no light to apprise plaintiff of the situation there, and then and there stopped said car in the midst of said lumber and other obstructions, when plaintiff believing that said car had stopped at the usual and customary place for passengers to alight at said station, while attempting to alight from said car, to-wit, on the night of August 6th, 1899, stepped and fell in and upon a pile of lumber or other material, over and among which the defendant had negligently and carelessly stopped said car, and by stepping or falling upon said lumber or debris, plaintiff fell upon the same and was thereby greatly cut, bruised and wounded, and divers members of his body were then and there greatly injured in so much that his right arm was paralyzed and he then and there became and was very sick, weak and disabled for a long period," etc.

The defendant moved the court to strike from the first and second counts of the complaints the portions thereof which are italicized and which are in parentheses, upon the ground that the facts as alleged in each of said counts were immaterial, irrelevant and surplusage. The defendant also moved to strike from the

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third count of the complaint the words "carelessly and recklessly" upon the ground that said words were immaterial, irrelevant and surplusage. The court overruled each of these motions. Thereupon the plaintiff amended the first count by striking out the portion thereof which is included with the parentheses, and inserting in lieu thereof the following: "and to provide a proper and sufficient place so that plaintiff might alight safely at said station; yet the defendant, not regarding its said duty, failed to provide a proper and sufficient place for plaintiff so to alight and stopped its car on which plaintiff was a passenger as aforesaid at a point where certain lumber and debris were lying within a few feet of its track." The plaintiff also amended the second count by striking out the words "light and means and facilities," wherever they occur. The defendant demurred to the first count of the complaint upon the following grounds: 1. Because plaintiff does not show how or in what manner the defendant failed to use due and proper care in providing a proper and sufficient place to enable plaintiff safely to alight at said station. 2. Because the complaint fails to show in said count that defendant placed said lumber and debris at the place where plaintiff alighted from said car. 3. Because the complaint fails to show in said count any duty upon the defendant to have removed the lumber placed along the track at the place of the accident. 4. That there was no legal duty upon defendant to have provided a proper and sufficient place whereby the plaintiff might have alighted from said car. 5. Because said count fails to show that defendant knew of the location of the lumber or debris at the point where plaintiff alighted from said car or that such lumber or debris was there sufficiently long for defendant to have been informed thereof, by the use of reasonable diligence on its part.

The defendant demurred to the second count upon the same grounds of demurrer as interposed to the first count and upon the following additional grounds: 1. Because said count does not show that defendant did not carefully and securely carry and convey and

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propel the plaintiff along said railway. 2. Because said count does not show how or in what respect the defendant failed to use due and proper care in providing a proper and sufficient place to allow plaintiff to alight from said car. 3. Because the allegation in said count, "and to have provided a proper and sufficient place, whereon and whereby plaintiff might have safely alighted at said station," is a mere conclusion of the pleader. 4. And the allegation that defendant did not use due and proper care in providing a proper and sufficient place to enable plaintiff to safely alight at said station, is a mere conclusion of the pleader.

To the third count the defendant demurred upon the same grounds of demurrer as interposed to the first and second counts of the complaint, and upon the following grounds: 1. Because said count does not show that there was any duty resting upon the defendant to have placed a light at the place where the plaintiff alighted from said car. 2. Because said count fails to show that the defendant was in any wise responsible for the lumber or other obstruction being on the ground near its track. These demurrers were overruled. Thereupon the defendant pleaded the general issue and filed four special pleas. Plea numbered two is copied in the opinion. The remaining special pleas are as follows: "3. The plaintiff ought not to recover of the defendant because he was guilty of contributory negligence, which proximately caused his alleged injury in this: that he stepped from said car without knowing or inquiring of the defendant or its agent as to whether or not the situation was reasonably safe for him to alight where said car had stopped. 4. Plaintiff ought not to recover because he was guilty of negligence which contributed proximately to the injury complained of in that after the car ran beyond its regular stopping place, plaintiff voluntarily alighted therefrom without requesting the defendant or its agent to carry him back to the regular stopping place and without ascertaining before he alighted from said car that he was alighting at a safe place. 5. The plaintiff ought not to recover because he was guilty of negligence which contributed

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proximately to the injury complained of in this that when he boarded and took passage on defendant's car, he did so knowing that said car was being operated without a conductor and without anybody to look after the safety of his alighting and that he alighted from said car without first ascertaining or attempting to ascertain that he was at a safe place to alight therefrom." The plaintiff demurred to the plea numbered two upon the following grounds: 1. The facts therein set forth do not constitute such negligence on the part of the plaintiff as would prevent his recovery in this suit. 2. Because the stopping of the car under the circumstances of this case as set forth in the complaint was an invitation to the plaintiff to alight at that place upon which he had a right to rely and act without making inquiry.

To the third plea the plaintiff demurred upon the following grounds: 1. It was not the duty of the plaintiff to make the inquiry therein referred to. 2. It shows no negligence on the part of plaintiff which proximately contributed to the injury complained of. 3. Because the stopping of the car under the circumstances of this case as set forth in the complaint was an invitation to the plaintiff to alight at that place upon which he had a right to rely and act without making inquiry.

The plaintiff demurred to the fourth plea upon the following grounds: 1. It assumes that it was the duty of plaintiff to inquire for information which it was the duty of the defendant to give. 2. It assumes that it was the duty of plaintiff to inquire for information in regard to possible danger which it was the duty of defendant to provide against. 3. Because the stopping of the car under the circumstances of this case as set forth in the complaint was an invitation to the plaintiff to alight at that place upon which he had a right to rely and act without making inquiry.

To the fifth plea the plaintiff demurred upon the following grounds: 1. It sets up no act of negligence on the part of the plaintiff that would legally relieve or release defendant from the negligence averred. 2. It as-

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sumes that it was plaintiff's duty to perform certain acts not required of him by law. 3. Because it seeks to avoid one act of negligence on the part of defendant, to-wit, a failure to stop at a proper place for plaintiff to alight, by showing that defendant was guilty of another act of negligence, to-wit, a failure to have a conductor or other person to look after the safety of passengers alighting from said car.

These demurrers were sustained, and the trial was had upon issue joined upon the plea of the general issue.

The tendency of the evidence is sufficiently shown in the opinion. Before the trial was entered upon the defendant moved the court to suppress the deposition of the witness J. H. Drake, which was taken in the cause, upon the following ground: "Because the commission issued by the clerk of this court was issued to John K. Watkins and T. D. Samford, Esquires, of Opelika, Lee county, Alabama, appointing them commissioners jointly to take the testimony of the witness J. H. Drake, and that the deposition of the said witness was taken by John K. Watkins, acting alone, as shown by his certificate to the deposition, and because the said Watkins was unauthorized to take said testimony alone, and because said commission issued by the clerk required that T. D. Samford, Esq., co-commissioner, be given notice of the time and place of taking the deposition. And that the certificate attached to the deposition by John K. Watkins, one of the commissioners, does not show that he gave T. D. Samford any notice of the time or place of taking the said deposition of the said witness." In support of this motion the defendant introduced in evidence the commission issued by the clerk of the court, under which the deposition purported to have been taken. This commission showed that it was issued to John K. Watkins and T. D. Samford, Esquires, "as commissioners to take the deposition of J. H. Drake, a material witness" in said suit. The defendant also introduced in evidence the certificate of John K. Watkins to the deposition. This certificate showed that the deposition of J. H. Drake was taken by John K. Watkins alone, he de-

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scribing himself as "the commissioner in said commission named." There was no evidence that Commissioner Samford did not have notice, nor any evidence tending to show why he did not act. It was shown by the evidence that the plaintiff, when he applied for the commission to take the deposition of the witness Drake suggested John K. Watkins as a commissioner and no one else, and that the name of T. D. Samford as commissioner was inserted in the certificate by the clerk and on request of the defendant. The court overruled the defendant's motion to suppress said deposition, and to this ruling the defendant duly excepted.

During the examination of James M. Mason, the plaintiff, he testified that he had incurred an expense of \$650 in seeking recovery from the injuries sustained by him; that the items going to make up this expense of \$650 consisted of a doctor's bill of \$160 and a hospital bill of \$159; that the hospital bill included nurses' services and the payment for a private ward which he had engaged in the Johns Hopkins Hospital. The other items of the \$650 account were for railroad fare, hotel bills and other expenses incurred in going to and being present in the Johns Hopkins Hospital.

The defendant moved the court to exclude from the jury all the testimony of the witness relative to all the items going to make up the \$650, except that portion of the testimony regarding the doctor's bill. The court excluded from the jury the testimony of the witness regarding railroad fare, hotel bills and other items mentioned, but refused to exclude the testimony relating to the hospital bill and the doctor's bill. To the court's refusal to exclude the testimony as to the hospital bill, the defendant duly excepted.

The defendant requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "If the jury believe the evidence, they must find their verdict for the defendant under the first count of the complaint." (2.) "If the jury believe the evidence, they must find for the defendant under the second count of the complaint." (3.) "If the jury believe

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the evidence, they must find their verdict for the defendant." (4.) "The jury can not find for the plaintiff, unless they are reasonably satisfied from the evidence that the regular stopping place for said cars was opposite the South Hull Street Methodist church, and that the car upon which the plaintiff was travelling, did not stop in front of said church, but that the car was carried on past said regular stopping place, and stopped at a place that was not the regular stopping place for the cars on that line, and that the motorman who was operating said car stopped the said car at a place where lumber and other obstructions were lying on the ground, and where there was no light to apprise plaintiff of the situation there; and the jury must further be reasonably satisfied from the evidence that the car was stopped in the midst of said lumber and other obstructions and that the plaintiff in stepping from said car stepped and fell on lumber or debris." (10.) "If the jury believe from the evidence that the plaintiff alighted from said car onto the ground and not on the lumber or debris, they must find their verdict for the defendant." (11.) "The court charges the jury that the undisputed evidence in this case shows that the plaintiff had ceased to be a passenger when he fell and was injured." (12.) "The court charges the jury that the plaintiff can not recover anything for hospital fees." (13.) "The court charges the jury that unless they are reasonably satisfied by a preponderance of the evidence, that the plaintiff received the injuries of which he complains while in the act of stepping from the car to the ground, and before he had safely alighted upon the ground, they can not find a verdict for the plaintiff." (14.) "The court charges the jury that before the plaintiff can recover in this cause, you must be reasonably satisfied by a preponderance of the evidence that he received the injuries complained of while in the act of stepping or descending from the defendant's car on the occasion testified about, and not after he had safely landed upon the ground." (15.) "The court charges the jury that under the evidence in this cause, the regular stopping place or station of the defendant

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company on its Cloverdale line, nearest the church testified about, was at the time of the injury complained of, on or just beyond, the bridge at which the injury occurred." (16.) "The court charges the jury that if they believe the evidence in this cause, they should find a verdict for the defendant." (17.) "The court charges the jury that under the evidence in this cause, the plaintiff can not recover under the third count of the complaint." (18.) "The court charges the jury that under the evidence in this cause, the plaintiff can not recover under the second count of the complaint." (19.) "The court charges the jury that under the evidence in this case, the plaintiff can not recover under the first count of the complaint." (20.) "The court charges the jury that at the time the plaintiff sustained his alleged injuries, he was not a passenger of the defendant company."

There were verdict and judgment for the plaintiff, assessing his damages at \$2,300. The defendant moved the court to grant a new trial, and assigned as grounds therefor the several rulings of the trial court which were adverse to the defendant and also the following grounds:

1. That the verdict was contrary to the law and the evidence.
2. That the verdict of the jury was excessive.
3. "Because the amount of the verdict of the jury was ascertained by casting lots in the following manner, to-wit, the jury agreed that each man should write down on a slip of paper the amount which he thought the plaintiff should recover, and then by taking the figures on these twelve slips of paper, adding them together, dividing the sum by 12, taking the quotient as a result, and rendering their verdict thereon, first having agreed to be bound by the result so ascertained." In connection with this motion the defendant introduced evidence tending to show that the last ground of the motion was based on the actual facts relating to the manner in which the verdict was arrived at by the jury. Several of the jurors testified and each of them stated that the verdict was arrived at in such manner. They also testified in detail as to the occurrences in the jury room while the jury was deliberating upon the verdict. The

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court, upon motion of the plaintiff, excluded the testimony of the several jurors as to what occurred in the jury room, and to this ruling the defendant duly excepted. The motion for a new trial was overruled, and the defendant duly excepted. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

C. H. ROQUEMORE and LOMAX, CRUM & WEIL, for appellant.—The court should have sustained the motion of the defendant to strike certain portions of the first and second counts. This appellant was sued as a street railway, and there is no duty upon street railways to provide stations or other places for passengers to alight from its cars.—*Sternberg v. State*, 56 Am. & Eng. R. Cases, 424; *Jacob's Case*, 92 Ala. 187; *Cheuning's Case*, 93 Ala. 24.

The special pleas of the defendant sufficiently set up contributory negligence of the plaintiff to bar his recovery.—*Bryan v. Man. Railway*, 121 N. Y. 126; 4 Am. & Eng. Ency. Law, 15; Booth on Street Railways, § 378.

The court should have sustained defendant's motion to suppress the deposition of the witness Drake. The defendant moved the court to suppress this deposition because it had not been taken according to the commission issued by the clerk of the trial court. It has been decided in many jurisdictions, and we take it to be the law that where one or more persons are named as joint commissioners, they must execute the power jointly, and the execution by one man is not a compliance with the power given in the commission.—*Gupp v. Brown*, 4 Dall. Book 1 (U. S.) Law Ed. 887; *Douge v. Pearce*, 13 Ala. 127; *Campbell v. Woodcock*, 2 Ala. 41; *Luckie v. Carothers*, 5 Ala. 290; *Kirk v. Suttle*, 6 Ala. 679; *Dearman v. Dearman*, 5 Ala. 202; 6 Ency. Pl. & Pr., 503; 9 Am. & Eng. Ency. Law (new ed.), 306; Weeks on Law of Depositions, § 308, p. 345; *Armstrong v. Brown*, 1 Wash. (6 U. S. C. C. Rep.), 34; *Marshall v. Frisbie*, 1 Mun. (Va.) 247.

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The plaintiff was not entitled to recover in this action. The injuries were sustained by him after he had alighted from the car and ceased to be a passenger of the defendant.

The contention of defendant is that the moment Mason alighted safely upon the ground, he ceased to be a passenger. In support of this proposition we cite the following authorities: *Creamer v. West. St. Ry.*, 156 Mass. 320; *Gorgan v. West End St. Ry. Co.*, 49 L. R. A. 421; *Chattanooga Elec. Ry. Co. v. Boddy*, 58 S. W. Rep. 646; *Platt v. Forty-second St. Ry.*, Thomp. & C. (N. Y.) 406; *Booth on Street Railways*, § 326; *Railroad Co. v. Peacock*, 69 Md. 257; *Buzby v. Traction Co.*, 126 Pa. St. 559.

GEORGE P. HARRISON and Fred S. BALL, *contra*.—The ruling of the court in refusing to strike certain portions of the first and second counts upon motion of the defendant was without prejudice to the defendant, in that the plaintiff subsequently amended the counts by striking the part of the counts to which said motion was directed.—*C. & W. R. Co. v. Bridges*, 86 Ala. 448.

The manner in which the jury arrived at their verdict could not be inquired into in any other way than by a motion for a new trial. The testimony of the jurors as to what occurred in the jury room during their deliberations can not be considered.—12 Am. & Eng. Ency. Law, 378 and notes; 14 Ency. Pl. & Pr., 905 and authorities; *Clay v. City Council*, 102 Ala. 302.

The court very properly overruled the motion to suppress the deposition of Drake. Samford was suggested by the adverse party. It is clear that if Watkins was authorized to act alone under the commission, because the adverse party is not entitled to such notice, then Samford could have been nothing more than an attorney for defendant in being present.—*Wisdom v. Reeves*, 110 Ala. 418. To hold that both must act, especially where one is nominated by the adversary, would make it possible for the adversary to prevent the deposition from ever being taken by having his commissioner absent himself, delay or refuse to act. We have found this question decided in this State, but we will call attention to a few

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decisions of other tribunals.—*Scott v. Baber*, 13 Ala. 185; *Campbell v. Webb*, 2 Ala. 41; *Berghams v. Alter*, 9 Watts (Pa.) 386; *Piggott v. Holloway*, 1 Binn. (Pa.) 436.

The appellee was entitled to recover under the facts of the case, as a matter of law. It is undisputed that the relation of passenger arose when Dr. Mason boarded the street car in the city of Montgomery and that relation continued until he left the car. The contention of the appellant is that he ceased to be a passenger as soon as he got his foot or feet on the ground and was clear of the car—that is, as soon as he was in no manner in touch with it, hands or feet, and that its responsibility to him ended instantly. It contends that it cannot be held liable to Dr. Mason even if it did put him off in a place so dangerous that the natural result was the injury complained of. On the other hand, the appellee contends that the relation of passenger between them continued until the appellee was safely on the ground with both feet and out of touch with both hands and feet, and in addition to that, that the appellant was responsible to the appellee to place him in a place of safety. By this we do not mean, that the appellant should have escorted him to the sidewalk or other place, or that it must have provided a platform or other facilities for his landing not usual in streets, but it must land him on the public street or public road at a place where it was in its usual condition, not obstructed or made dangerous by unusual obstacles.—*Richmond City R. Co. v. Scott*, 86 Va. 902; *Dixon v. Brooklyn Co.*, 100 N. Y. 170; *Creamer v. West End S. R. Co.*, 156 Mass. 320.

Street railway companies, as carriers of passengers for hire, are bound to exercise the highest degree of care and diligence consistent with the nature of their undertaking, and are responsible for the slightest neglect. This rule extends to the management of cars and track, and to all arrangements necessary for the safety of passengers as respects accidents from collision or otherwise.—*Smith v. St. Paul City R. Co.*, 16 Am. & Eng. R. R. Cases, 310; s. c. 32 Minn. 1; 50 Am. Rep.

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550; 18 N. W. Rep. 827; 7 Rap. & Mack. Dig. of Ry. Law, 458, § 325.

DOWDELL, J.—The appellee sued the appellant, the Montgomery Street Railway, to recover damages for injuries received by him as a passenger on one of the appellant's cars, in alighting from the car, caused by appellant's negligence. The plaintiff recovered a judgment in the court below, and from this judgment the present appeal is prosecuted.

There are numerous assignments of error, in all, fifty-five. Some of these assignments are, however, not insisted on in argument, and such as are not insisted on, will not be considered. The first seven relate to the rulings of the court on motions of the defendant; the appellant here, to strike certain parts of the complaint as being immaterial averments, and merely surplusage. After the action by the court overruling the motions to strike, the plaintiff amended the first and second counts of the complaint by striking out the words, "light, means, and facilities," to which the motions to strike were in part directed. With the complaint as thus amended no injury resulted to the defendant in overruling the motions to strike. If it be conceded that there was error, still we are unable to see that the defendant was in any way prejudiced, and unless it affirmatively appears that the refusal of the court to strike immaterial and irrelevant averments results prejudicially, such refusal does not constitute reversible error. *Columbus & Western R'y Co. v. Bridges*, 86 Ala. 448.

The 8th, 9th and 10th assignments of error relate to the overruling of the defendant's demurrer to the complaint, and the questions raised by these assignments that are insisted on in argument, are also raised by charges requested by the defendant, and which were refused by the court. These embrace the vital points in the case, and as they were argued together by counsel for appellant, will in like manner be considered together here.

The gist of the action is in the alleged negligence of the defendant in stopping its car, upon which plaintiff

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was riding as a passenger, in an unsafe and dangerous place for him to disembark, and while so disembarking or immediately upon alighting from said car, received the injuries alleged in the complaint. The complaint in this respect sufficiently states a cause of action. It was not incumbent on the plaintiff in his pleading to aver in connection with the duty of the defendant to provide a safe place for his alighting from the car, to aver what should constitute a safe place, nor to undertake a minute description of the place where the stop was made, and the alleged injury received. After averring the duty of the defendant to provide a safe landing place for the plaintiff in alighting from its car, the complaint in the first and second counts, with sufficient certainty and definiteness avers the failure to perform such duty and in a manner to constitute negligence. So in the third count, after averring the duty of stopping the car at the usual or customary stopping place, the averment of the failure to do so, and the manner and form of the breach of this duty which resulted in the injury to the plaintiff, is sufficiently definite in charging negligence and consequent damage. The complaint upon the whole states a cause of action with that degree of certainty required in pleading, and the court properly overruled the demurrer.

The 2d, 3d, 4th and 5th pleas of the defendant, to which demurrers were sustained, sought to set up contributory negligence on the part of the plaintiff. The 2d plea avers, "that when the car stopped, the lights from the car shone for ten or twelve feet on either side of the track, and that plaintiff could have seen the alleged lumber and debris before he stepped thereon, by the exercise of ordinary and reasonable care on his part." There is no averment in this plea that the plaintiff failed to exercise ordinary and reasonable care, or that he did see the lumber. In this respect the plea was bad. The 3d plea assumes that it was the duty of the plaintiff to inquire of the defendant or its agent as to whether the place of stopping was a reasonably safe place, while on the contrary he had a right to assume on the conduct of the defendant, as alleged in the complaint, that

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it was a safe place for him to alight. The 4th plea for a similar reason was bad. The 5th plea is nothing more than an effort to excuse one omission of duty on the part of the defendant by its omission of still another duty. For the reasons stated, these several pleas were subject to the demurrers, and there was no error in the court's action in sustaining them.

We do not understand it to be a contention on the part of the appellee, as supposed by appellant's counsel, that any duty rested on the appellant to provide along the line of its railway, depots and stations for the convenience or safety of its passengers, as in case of steam railways, but only to provide for reasonably safe places for its passengers to get on and off its cars. It cannot be doubted that street railway companies, as common carriers of passengers for hire, are under the duty of exercising the highest degree of diligence and care in conserving the safety of their passengers, and are responsible for the slightest neglect.—*Smith v. St. Paul City R. Co.*, 16 Am. & Eng. R. R. Cases, 310; 7 Rap. & Mack's Dig. R'y Law, p. 458, § 325. This duty arises when the relation of carrier and passenger begins, and continues until that relation is ended. These propositions of law are not disputed, but it is contended in the present case, that at the time of the injury complained of, the plaintiff was no longer a passenger on the defendant's car, after alighting from the same, and that the defendant was relieved of all responsibility after the plaintiff had alighted from its car onto the ground at the place where it stopped for that purpose. And this involves the question of the duty of the carrier to provide a reasonably safe place for the landing of its passengers. The same duty of exercising the highest degree of diligence and care in the carriage or transportation of passengers, in law and reason extends to and includes the safe landing of the passenger at the termination of his journey or ride, and this duty is not performed when the carrier lands its passenger at a time and place of such unknown environment to him, that in his first effort to depart after alighting onto the ground, he is tripped and thrown by an unseen pile

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of lumber and debris. There was evidence which tended to show that the plaintiff became a passenger at night, and, being a dark night, on one of the defendant's street cars, and paid his fare to be transported thereon, that when nearing the end of his journey he gave the usual stop signal, that in obedience to the signal the car was stopped for him to get off, that he alighted from the car onto the ground, and that at the first step he attempted to take he was tripped and thrown by unseen lumber, which had been piled at the place by the defendant the day previous while repairing a bridge over which its tracks ran, and from the fall received the alleged injuries. There was evidence which also tended to show that the customary stopping place was immediately in front of the church, where the plaintiff was going to attend religious services, but on the present occasion the car passed this customary stopping place, and stopped about thirty feet beyond, and where the lumber and debris were piled by the side of its track, and between the track and the church. While there was conflict in the evidence as to the presence of lumber and debris at the place of stopping, and as to the usual and customary place of stopping in that locality for discharging passengers, we think there can be no question of the defendant's liability on the phase of the evidence above stated if believed by the jury.

This case in principle is similar to the case of *Richmond City Railway Co. v. Scott*, 86 Va. 902, and the doctrine there laid down, and the authorities cited in support of it, are applicable here. We quote from authorities cited in that case. In Wharton on Negligence, section 649, it is said: "When danger approaches it is the duty of the officers of the road to notify passengers, so that they can take steps to avoid it; and failure to give such notice is negligence. So, also, if there is a dangerous place at the landing, it is the duty of the conductor to warn those about stepping out." "And * * * he must give notice to all if any danger in alighting is probable."

In *Cartwright v. Chicago, etc., R'y Co.*, 52 Mich. 606, COOLEY, C. J., says: "If a car in which there were

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passengers, was not standing where it would be safe for them to alight without assistance, it was the duty of the company to provide assistance, or give warning, or move the car to a more suitable place;" citing *Railroad Co. v. Whitfield*, 44 Miss. 466; *Railroad Co. v. Buck*, 96 Ind. 346; *McGee v. Railroad Co.*, 92 Mo. 208; *Maverick v. Eighth Ave. R'y Co.*, 36 N. Y. 378. This doctrine applies to street railway companies, and they are bound by the same liability.—*Smith v. St. Paul*, 32 Minn. 1, s. c. 16 Am. & Eng. R. R. Cases, cited above; *Citizens, etc., R. R. Co. v. Twiname*, 111 Ind. 589; *Topeka City R'y Co. v. Higgs*, 38 Kan. 375; *Railway Co. v. Findley*, 76 Ga. 311; *Barrett v. Third Ave. R'y Co.*, 45 N. Y. 628; *Hill v. Ninth Ave. R. R. Co.*, 109 N. Y. 239.

The record does not show that the item of \$159 of hospital fees paid by the plaintiff, while under treatment for his injuries, included anything other than that of the expense of a nurse and a ward in the hospital. The court excluded the item of board and traveling expenses paid out by the plaintiff. If the attendance of a nurse was necessary while the plaintiff was under treatment for his injuries received on account of the negligence of the defendant, we cannot see why this is not as essentially an element of recoverable damage, as the professional fees of the attending physician. So, too, the necessary expense of a private ward in the hospital while undergoing treatment would constitute a proper element of recoverable damage. There was no error in the action of the court in refusing to exclude the item of \$159 from the consideration of the jury in estimating plaintiff's damages.

A majority of the court are of the opinion that there was error in overruling the motion to suppress the deposition of J. H. Drake. They hold that since the commission was joint and not several and nothing was done by defendant to waive the absence of the commissioner Samford, the execution by Watkins was invalid; and in this they follow the rule mentioned in *Dogue v. Pearce*, 13 Ala. 128, and sustained by other authority, for the maintenance of which they think there are substantial

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reasons. The writer is of a different opinion. What was said in *Dague v. Pearce, supra*, was dictum. The question here presented was not before the court for decision in that case. The depositions here were taken on interrogatories filed under section 1835 (Code, 1896), and that section directs what shall be done. This statute provides: "The party, after making affidavit, may file with the clerk interrogatories to be propounded to the witness, of which, and of the residence of the witness, and of the commissioner to be appointed [italics are mine], he must give the opposite party, or his attorney, notice in writing, who has ten days thereafter to file cross interrogatories, to which the party filing the interrogatories may file rebutting interrogatories. After the expiration of the ten days, a commission, accompanied by a copy of the interrogatories and of the cross and rebutting interrogatories, if filed, must be issued by the clerk to take the deposition, which may be taken at such time and place as the commissioner shall appoint. On failure to give notice herein required of the residence of the witness and the commissioner, unless the same is waived by the adverse party, the deposition of such witness must be suppressed at the cost of the party taking it."—Code, 1896, § 1835. I think the statute clearly contemplates that the party filing the interrogatories shall nominate the commissioner to whom the clerk shall issue the commission. As I construe the statute, he, the party filing the interrogatories, and not the clerk, is required to give the opposite party, or his attorney, notice of the commissioner to be appointed, and the last clause in the statute provides, "on failure to give the notice herein required," etc., "unless the same is waived by the adverse party, the deposition of such witness must be suppressed at the cost of the party taking it." It is quite clear to my mind that the duty of giving the notice required is imposed upon the party filing the interrogatories, and not upon the clerk; if the latter, why should the costs be imposed upon the party for the failure of the clerk to discharge his duty, in case the deposition is suppressed for failure to give the required notice? Again, it is not to be supposed

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that the clerk would be required to find out or ascertain without the suggestion of the party filing the interrogatories, who could be procured to act as commissioner. It may be, and often is the case, that the deposition is to be taken at a place, where the clerk is entirely unacquainted with any person. Certainly, the statute does not provide that the adverse party may suggest a commissioner, nor is there any authority expressly or impliedly given to the clerk to appoint on his suggestion. If the clerk may appoint a commissioner on the suggestion of the adverse party, and it be required that the commission shall be jointly executed, then it would be in the power of the adverse party to prevent ever obtaining the testimony of the witness on interrogatories, by the suggestion and appointment of a co-commissioner who would fail to act. I think the clerk acted without authority in appointing Samford as a co-commissioner on the suggestion of the adverse party, to act with Watkins, who was nominated by the party filing the interrogatories as the commissioner to be appointed. It is quite evident that the statute confers no such authority. If Watkins was in any respect an unsuitable person to act as commissioner, upon the fact being shown to the court, it would be within the power of the court to control the matter. There is no pretense that Watkins was an unsuitable person, or that the commission was in any respect improperly executed by him, except that Samford did not jointly act with him. It does not appear why Samford did not act; for aught that the court knows he refused to act. I can see no good reason for saying that the execution of the commission by Watkins was not valid. The statute under consideration received a construction as to the right of the opposite party to demand notice of the time and place of taking the deposition in *Wisdom v. Reeves*, 110 Ala. 418, and what was there said seems to me in principle to support my views above expressed.

On the motion for a new trial, the court very properly excluded all the evidence by the jurors who tried the case, as to the manner of their arriving at the verdict.—*Eufaula v. Speight*, 121 Ala. 613. This evidence

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being excluded the ground of the motion based on the conduct and action of the jury in reaching a verdict was unsupported. We do not think the verdict of the jury as to the amount of damages awarded, excessive. Other grounds of motion for a new trial, which relate to the rulings of the court on the trial, we have already treated in the foregoing opinion.

For the error pointed out the judgment will be reversed and the cause remanded.

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Action of Assumpsit.

1. *Bill of exceptions; how it should be shown that the bill was signed in vacation.*—Where a bill of exceptions purports to be signed in vacation, and there is in the record neither order of the court nor agreement extending the time for signing, such bill of exceptions will not be considered on appeal, although it contains a recital to the effect that it was signed within the time allowed by the order of the court; such recital being merely a statement of the judge, and, therefore, can not be looked to as establishing an order of the court allowing the bill to be signed in vacation.

APPEAL from the Circuit Court of Geneva.

Tried before the Hon. A. H. ALSTON.

This was an action of assumpsit brought by the appellee against the appellant. The appeal is prosecuted from a judgment in favor of the plaintiff. Under the opinion on the present appeal, it is unnecessary to set out the facts in detail.

W. O. MULKEY and SOLLIE & KIRKLAND, for appellant.

P. N. HICKMAN, *contra*.

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SHARPE, J.—That which is incorporated in the transcript as a bill of exceptions purports to have been signed after the adjournment of the term of court at which trial was had, and there is neither order of court nor agreement extending time for signing. In it there is a recital to effect that it was signed within the time allowed by an order of the court; but that recital, being merely a statement of the judge, cannot be looked to as establishing an order of court, the proper evidence of its existence being a transcript of the order.—*Dantzler v. Swift Creek Mill Co.*, 128 Ala. 410.

The assignments of error are each based on matters which could only be shown by a bill of exceptions, and since the supposed bill is not legally authenticated, the assignments are without support.

Judgment affirmed.

Marks & Gayle v. Wood.

Statutory Trial of the Right to Property.

1. *Executions; statute requiring itemized statement of bill of costs applicable to alias and pluries writ.*—The statute requiring that executions shall contain an itemized statement of the bill of costs (Code, § 1883), applies to *alias* and *pluries* writs of execution, as well as original executions; and all executions without such itemized statement of the bill of costs are illegal and void.
2. *Same; when items of cost insufficient.*—The statement of costs attached to an execution as follows: "Clerk's fees, * * *; fees on former *fl. fa.*, \$5.75; * * *; Sheriff's fees, * * *; fees on former *fl. fa.*, \$2.05," is not the statement of the several items composing the bill of costs as required by the statute (Code, § 1883); and an execution to which such statement is attached is illegal and void, and the levy of such execution is likewise void.

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•133	546
133	533
f133	464

APPEAL from the Circuit Court of Lowndes.
Tried before the Hon. J. C. RICHARDSON.

[Marks & Gayle v. Wood.]

In August, 1897, Marks & Gayle, a partnership, recovered a judgment against one G. T. Wood in the circuit court of Lowndes county. Upon this judgment an execution was issued on September 10, and was returned "no property found." In April, 1899, an *alias* execution was issued upon said judgment and in August, 1899, it was returned "no property found." On October 30, 1899, a *pluries* execution was issued upon said judgment. This execution was levied upon certain personal property on November 1, 1899. On November 3, 1899, the appellee, Clemen Wood, made an affidavit claiming the property levied upon as hers and gave bond as required by law. Thereupon a suit was instituted for the trial of the right to the property levied upon between the plaintiffs in execution and the claimant. Upon the trial of the claim suit thus instituted, the plaintiffs in execution introduced in evidence a judgment rendered in their favor against G. T. Wood and the original and *alias* executions issued upon said judgment and which were returned into court "no property found." Upon plaintiffs offering to introduce in evidence the *pluries* execution under which the levy was made upon the property in controversy, the claimant objected to the introduction of such execution upon the following grounds: 1. Said execution was void on its face. 2. Said execution failed to set forth the itemized statement of the several items composing the bill of costs named therein. 3. Said execution contained as a part of the bill of costs under the head of clerk's fees, the statement "Fees on former *fi. fa.* \$5.75," and failed to set out the items composing said fees on the former *fi. fa.* 4. Because said execution contained as a part of the bill of costs under the head of sheriff's fees, the statement "Fees on former *fi. fa.* \$2.05," and failed to set out the items composing such fees on the former *fi. fa.* The court sustained the claimant's objection and refused to allow plaintiff to introduce in evidence said *pluries* execution. To this ruling of the court the plaintiff duly excepted. The statement of the costs attached to the execution is sufficiently stated in the opinion.

[Marks & Gayle v. Wood.]

The plaintiffs then introduced in evidence the affidavit and claim bond made and given by the claimant, and introduced testimony showing separately the value of the articles of property levied on under the execution, and that said property was found in the possession of G. T. Wood. The claimant introduced no evidence.

The plaintiffs requested the court to give to the jury the general affirmative charge in their behalf, and duly excepted to the court's refusal to give such charge as asked. The court, at the request of the claimant, gave the general affirmative charge in her favor, and to the giving of this charge the plaintiffs duly excepted.

There were verdict and judgment for the claimant. The plaintiffs appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

A. D. PITTS and C. W. WHITTEN, for appellant, cited *Brainard v. Harrison*, 53 Ala. 362; *Maxwell v. Pounds*, 116 Ala. 551; *Nordlinger v. Gordon*, 72 Ala. 239; 8 Ency. Pl. & Pr., 432.

POWELL & MIDDLETON, *contra*, cited *Nordlinger v. Gordon*, 72 Ala. 239; *Jackson v. Bain*, 74 Ala. 328 *Tal'ferro v. Lane*, 23 Ala. 369; *Schmagel v. Whitchurst*, 103 Ala. 262; *Maxwell v. Pounds*, 116 Ala. 551; Code of 1896, § 1883.

MCCLELLAN, C. J.—Section 1364 of the Code provides that clerks of courts and sheriffs must keep fee books, and that each such officer “must enter therein, in the form of a regular account opened for that purpose, every fee charged by him for every distinct service rendered by him.” Section 1365 provides that “no clerk, register or sheriff shall demand or receive a fee for any service by him performed not justified by a charge entered in his fee book.” And section 1883 is as follows: “At the foot, or on some part of the execution, the clerk must state, in intelligible words and figures, the several items composing the bill of costs; and without such copy of the bill of costs, the execution

[Marks & Gayle v. Wood.]

is illegal, and shall not be levied." There is no warrant in this language, and no reason outside of it for saying that this section applies to original executions only and not to *alias* and *pluries* writs: It applies alike to all executions issued by the clerk of the circuit court. Looking alone to the letter of this section, it would seem to be fairly certain that it requires the charge for each act of service performed by the clerk and sheriff, etc., to be separately stated on the execution, but any doubt that might be supposed to exist as to this is dissipated when its requirement that the statement on the execution shall be *a copy of the bill of costs* is considered along with the requirement of section 1364 *supra* that on the bill of costs shall be entered *every fee* charged by the officer for every distinct service rendered by him. Now it is clear, and not questioned by counsel in this case, that with reference to the issuance and return of an execution both the sheriff and the clerk perform several acts of distinct service for each of which a fee is allowed by law and required by section 1364 to be separately entered on their respective bills of costs in their fee books, and that there is no one act of service on the part of the clerk in that connection which can amount to the sum of \$5.75, nor any one act of service on the part of the sheriff for which a fee of \$2.05 is allowed. The execution issued in this case on the 30th day of October, 1899, and levied on the property involved in the claim of Clemen Wood, was the second or third to issue; the other or others having been returned "no property." In the statement of the costs attached to this execution are the following entries: "Clerk's Fees * * * Fees on former fi. fa. \$5.75. * * * Sheriff's Fees * * * Fees on former fi. fa. \$2.05." Each of these statements is in form an "*omnium gatheringum*," and accurately so. Each is in fact a lump statement of the aggregation of the fees allowed for several distinct acts of service rendered by the respective officers. Neither of them is a copy of the bill of costs in reference to said service, and neither of them is a statement "of the several items composing the bill of costs." By the very letter of section 1883, therefore, the execution

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of October 30th, 1899, was illegal, and by that section its levy was and is unequivocally and mandatorily interdicted and forbidden. It was void upon every elementary principle obtaining in the premises. The levy was void. The court properly excluded this waste paper from the evidence. The burden being upon the plaintiffs on the issue made on Clemen Wood's claim to show a valid execution and a valid levy on property in the possession of defendant in execution, and they having failed to carry this burden, the circuit court properly gave the affirmative charge for the claimant.

Affirmed.

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Action for Money Had and Received.

1. *New trials; review of judgment granting same.*—When an appeal is taken from an order of the trial court granting a new trial, the Supreme Court will not reverse such judgment, unless the evidence plainly and palpably supports the verdict.

APPEAL from the Circuit Court of Crenshaw.

Tried before the Hon. R. L. HARMON, Special Judge.

This was an action for money had and received, brought by the appellees, T. K. Brantley & Co., a partnership, against the appellant, William J. Merrill, Sr., in which the plaintiff sought to recover money paid by them to the defendant for the purchase of cotton. The facts of the case are sufficiently stated in the opinion.

There were verdict and judgment rendered in favor of the defendant. The plaintiffs made a motion for a new trial upon the ground that the verdict was contrary to the evidence, and that the plaintiffs had newly discovered evidence, which showed that they did not know that the cotton purchased by them was the cotton upon which they had a mortgage. Upon the hearing of this motion the court granted the motion and ordered a

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new trial. From the judgment granting the motion and ordering a new trial the defendant appeals, and assigns the rendition thereof as error.

C. E. HAMILTON and J. O. SENTELL. for appellant. Money paid with the full knowledge of the facts is not recoverable back.—3 Brick. Dig., 52, § 20; *Welch v. Mayer*, 48 Ala. 291.

RUSHTON & POWELL, *contra*.—The granting of new trials is largely a matter of discretion. This court will not reverse such a judgment unless the evidence plainly and palpably supports the verdict.—*Cobb v. Malone*, 92 Ala. 630; *White v. Blair*, 95 Ala. 147; *Holland v. Howard*, 105 Ala. 538.

SHARPE, J.—Plaintiffs held a first mortgage on cotton grown by one Wallace to secure a debt amounting to more than the value of the cotton. Defendant held a second mortgage on the same cotton taken after plaintiffs' had been duly recorded. After the cotton was gathered, baled and placed in a warehouse, defendant sold it together with other cotton to plaintiffs. Plaintiffs now sue to recover back the money paid for the cotton claiming they purchased under a mistaken belief that defendant owned the cotton and without knowing it was the same cotton covered by their mortgage.

By their purchase plaintiffs obtained no appreciable benefit since they already had a paramount interest in the cotton equaling it in value and defendant parted with nothing except an equity of redemption, worthless because the sum required to redeem would have exceeded the value of the cotton. The money was, therefore, paid without any substantial consideration and is subject to be recovered as it equitably belongs to the plaintiffs, unless they are in the attitude of having paid it voluntarily with notice of the facts, in which case they would be without remedy.

To disentitle a party, on such ground, to recover, it must appear that he had actual knowledge of the attendant facts which were calculated to influence the making

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or withholding of the payment. For that purpose knowledge is not necessarily imputed by possession of the means of learning the real facts.—*Young v. Lehman, Durr & Co.*, 63 Ala. 519; *Rutherford v. McIvor*, 21 Ala. 750. The fact that plaintiffs knew defendant, as well as they, had a mortgage on Wallace's crop did not as a legal conclusion charge them with knowledge that the cotton sold them by defendant was part of that crop.

Whether plaintiffs had such knowledge was the main question of fact involved. The latitude allowed to the trial court's discretion in passing on motions for new trial is such that this court will not reverse a judgment granting the motion unless the evidence "plainly and palpably supports the verdict."—*Cobb v. Malone*, 92 Ala. 630. That rule applied to the evidence in this case works the conclusion that the judgment be affirmed.

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Action of Assumpsit.

1. *Action upon contract to pay property; what necessary to maintain suit.*—In a contract to pay property or for the delivery of personal property, an action for the value of the property can not be maintained until there has been a demand made for the property and a refusal or failure to deliver it, unless it be shown that such demand would have been futile; and a complaint upon such a contract which alleges neither demand nor refusal, nor any facts which would have excused the making of it, is faulty and subject to demurrer.
2. *Pleading and practice; when complaint filed in the circuit court no departure from the complaint in justice of the peace court.* Where in a complaint filed in a justice of the peace court the "plaintiff claims of defendant seven hundred pounds of lint cotton on a waive note due and unpaid," an amended complaint filed in the circuit court wherein the "plaintiff claims of the defendant seventy dollars, the value of seven hundred pounds of lint cotton which defendants owe to the plaintiff, and which was due * * * under a writ-

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ten instrument or mortgage," is not a departure from the cause of action stated in the complaint filed in the justice of the peace court.

3. *Evidence; admissibility of mortgage in action of assumpsit.*—In an action of assumpsit, wherein the plaintiff claims the value of a certain number of pounds of lint cotton, which it is averred in the complaint defendant owed plaintiff under a written instrument or mortgage made by the defendant, the mortgage referred to in the complaint is admissible in evidence; and it is no valid objection to the introduction of such mortgage in evidence that the plaintiff had not shown that it was given for a *bona fide* subsisting debt.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. J. C. RICHARDSON.

This case was originally instituted by appellee in a justice of the peace court; the complaint, as shown by the record, being as follows: "The plaintiff claims of the defendant seven hundred pounds of lint cotton on a waive note, due and unpaid." Upon a hearing of the cause the justice rendered a judgment against defendant as follows: "After hearing the evidence the court gave judgment for the amount claimed or its value in money, \$70, and costs against defendants."

The case was removed by defendants to the circuit court of Montgomery county by a statutory writ of *certiorari*. At the trial in the circuit court the plaintiff filed a new complaint, which is copied in the opinion. The defendants filed a motion to strike this new complaint from the file, assigning several separate grounds which raised substantially the proposition that the new complaint set up a new cause of action in that the suit instituted in the justice court was in detinue, and the complaint filed in the circuit court was in assumpsit. This motion was overruled. Thereupon the defendants demurred to the complaint as filed in the circuit court upon the ground, among others, that it failed to aver any breach of the contract sued on.

During the trial of the cause the plaintiff introduced in evidence the mortgage which was given by the defendants, and which was referred to in the complaint. The defendants objected to the introduction of this mortgage

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in evidence upon several grounds, which were substantially as follows: 1. It was not the property described in the complaint. 2. It shows on its face that it was not the original promise or undertaking between the parties to this suit, and that such promise was evidenced by the note. 3. It is merely a security for the payment of the debt and not a promise. The court overruled this objection, and the plaintiff duly excepted. Under the opinion on the present appeal it is unnecessary to set out in detail the facts of the case or the rulings of the trial court upon the evidence.

Upon the introduction of all the evidence the defendants requested the court to give to the jury, among others, the following written charge: "If the jury believe the evidence, they must find for the defendants." The court refused to give each of the charges requested by the defendants, and the defendants separately excepted.

There were verdict and judgment for the plaintiff. Defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

HILL & HILL, for appellants.—The motion of the defendants to strike the amended complaint filed in the circuit court should have been granted.—*Leatherwood v. Suggs*, 96 Ala. 383; *James v. Vicors*, 119 Ala. 32; *McCummin v. Campbell*, 82 Ala. 566; 2 Ency. Pl. & Pr., 992.

The complaint filed in the circuit court did not sufficiently state a cause of action.—2 Ency. Pl. & Pr. 992.

LOMAX, CRUM & WEIL, *contra*.—The law does not require strict pleading in justice of the peace court. The complaint filed in the circuit court was not a departure from the cause of action as set forth in the complaint filed in the justice court.—*Freeman v. Spegal*, 83 Ala. 191; *L. & N. R. R. Co. v. Barker*, 96 Ala. 435.

The mortgage was properly admitted in evidence. The recital of indebtedness in the mortgage was sufficient evidence of the debt.—*O'Conner v. Nadel*, 117 Ala. 595; *Buford v. Raney*, 122 Ala. 565.

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MCCLELLAN, C. J.—Action by Bussey against Ingram and another. The complaint is as follows: "Plaintiff claims of defendants seventy dollars, to-wit, the value of to-wit seven hundred pounds of lint cotton, which the defendants owe to plaintiff and which was due on the 1st day of October, 1900, under a written instrument or mortgage made by defendants on the 17th of May, 1900, and plaintiff avers that the defendants expressly waive in said instrument all exemptions secured to them under the laws of Alabama." One ground of the demurrer to this complaint was that it failed to aver any breach of the contract sued on. The demurrer should have been sustained. On a contract to *pay* property, an action for the value of the property cannot be maintained until there has been a demand made for the property and a refusal or failure to deliver it, unless it is made to appear that such demand would have been futile. This complaint alleges neither a demand and refusal, nor any facts which would have excused the making of it. Nor was there any evidence adduced on the trial going to show such demand and refusal, or any facts which would have authorized suit for the money value without demand for the property. The court, therefore, erred also in refusing the affirmative charge requested by the defendants.—*Ragland v. Wood*, 71 Ala. 145, 150, and authorities there cited. If there is any custom efficacious to take contracts for the payment of cotton out of the doctrine of the case cited, there is no averment or proof thereof in this record.

We deem it unnecessary to discuss other points arising on the transcript at length. We do not find that the action before the justice of the peace was in detinue, and hence concur with the circuit court in holding that the complaint there filed was not a departure from the case tried in the justice's court.—*Freeman v. Speegle*, 83 Ala. 191; *L. & N. R. R. Co. v. Barker*, 96 Ala. 435.

The mortgage was properly received in evidence under the complaint.—*Buford v. Rancy*, 122 Ala. 565; *O'Connor v. Nadel*, 117 Ala. 595.

Reversed and remanded.

[Griffin v. Dauphin.]

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Statutory Action of Ejectment.

1. *Execution; not void because costs in justice of the peace court were not itemized.*—An execution issued upon a judgment rendered by the circuit court in a cause brought there by appeal from a justice of the peace court, is not vitiated by the fact that among the items of costs endorsed thereon, the magistrate's fees are shown only by their gross amount.
2. *Judicial sale; not affected by maintenance or adverse possession.* A judicial sale made by a public officer under legal process, is not without the doctrine of champerty or maintenance; and its validity is not affected by the fact that the land is, at the time of the sale, in the possession of a third person claiming adversely to the defendant in the process.
3. *Same; effect on the possession of third person through tenant.* Where, at the time of a sale under execution of land in the possession of tenants of a third party who claim under a deed from the defendant in execution, which deed was executed subsequent to the issuance of the execution, the judicial sale of such lands terminates the tenancy; and the attornment of the tenants of said third party to the purchaser has the legal effect of transferring the possession of the lands from such third party to the purchaser, and the right of said third party acquired by his deed from the defendant in execution is thereby defeated; the sheriff's deed to said purchaser conveying such title as the defendant in execution had on the date of its issuance.

APPEAL from the Circuit Court of Covington.

Tried before the Hon. JOHN P. HUBBARD.

This was a statutory action of ejectment, brought by the appellee, J. M. Dauphin, against the appellant, J. P. Griffin, to recover certain lands specifically described in the complaint. The defendant pleaded the general issue, and the cause was tried upon issue joined upon this plea.

The plaintiff based his right to recover upon the following facts: One T. E. Chesser sued one J. J. Harralson

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in a justice of the peace court. On appeal to the circuit court, judgment was rendered in said cause in favor of Harralson for the costs of the suit. From a judgment rendered in the circuit court, an appeal was taken to the Supreme Court, where the judgment was affirmed on the 29th day of October, 1898. On November 22, 1899, an execution was issued out of the circuit court of Covington county on said judgment against Chesser, and was, by the sheriff, levied upon the lands involved in this suit, on January 6, 1899. On April 17, 1899, the lands were sold under the levy of an execution. One L. J. Salter became the purchaser at said sale and a deed was executed to him by the sheriff on April 17, 1899. On November 7, 1899, said Salter conveyed the lands to the plaintiff.

The defendant's claim to the land was based upon a deed executed to him by T. E. Chesser, the defendant in execution, which deed bore the date of December 6, 1898.

The plaintiff offered in evidence the execution issued upon the judgment recovered by Harralson against Chesser. Attached to this execution was the bill of costs. The clerks' fees, the sheriff's fees and the witness' fees were itemized in this bill of costs, but the fees of the justice of the peace were stated in the bill of costs in the gross amount. The defendant objected to the introduction of the execution in evidence, (1) because it was illegal; (2) because said execution was void; and (3) because the magistrate's fees set out in said execution were not itemized. The court overruled the objection, and the defendant excepted.

L. J. Salter, as a witness for the plaintiff, testified that after he purchased the lands involved in the suit at the execution sale, and received the sheriff's deed thereto, he demanded possession of said lands from one Langston, who was tenant in possession, and demanded the rent then due for said lands; that Langston recognized him as his landlord and attorned to him as such, and, thereafter paid the rent to him, Salter, for said lands. Salter further testified that he executed the deed to the plaintiff Dauphin after Langston had attorned to him as landlord. The defendant as a witness in his own behalf

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testified that he bargained for the land with Chesser in December, 1898, and that although the deed to said land was not delivered until April, 1899, he rented the lands to Langston for the year 1898, after the contract of sale was made between him and Chesser; that on November 7, 1899, at the time Salter executed the deed to the plaintiff, he, the defendant, was in possession of said land, claiming the same as his own, through his tenant Langston; that in January, 1900, he went into possession of said lands and was so in possession claiming said lands as his own at the time of the institution of this suit.

The court at the request of the plaintiff gave the general affirmative charge in his favor. The defendant excepted to the giving of this charge, and also separately excepted to the court's refusal to give each of the following charges requested by him: (1.) "If you believe the evidence, your verdict should be for the defendant." (2.) "If at the time of the execution of the deed from Salter to the plaintiff the defendant was in possession of the lands sued for through tenants, and through such tenants claimed said lands as his own and adversely against the claims of all persons, your verdict should be for the defendant." (3.) "If L. J. Salter was not in the actual possession of the lands sued for at the time of the execution of his deed to plaintiff, you should find for defendant." (4.) "If from the evidence you are reasonably satisfied that defendant, Griffin, through his tenants, was in the actual adverse possession of the lands sued for, claiming the same as his own against all persons, at the time of the execution and delivery of the deed by Salter to the plaintiff, you should find for the defendant."

There were verdict and judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

POWELL & ALBRITTON, for appellant.—The execution offered in evidence was void, and, therefore, not admissible.—Code, §§ 484, 1883; *Maxwell v. Pounds*, 116 Ala. 551.

The court below erred in giving the general affirmative charge requested by the appellee, and refusing the gen-

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eral affirmative charge requested by the appellant. *Pearson v. King*, 99 Ala. 125; *Davis v. Curry*, 85 Ala. 133.

A. L. RANKIN, *contra*.—Salter's entry on the land under paramount title constituted an eviction and this justified Langston in accepting him as his landlord and paying rent to him in order to keep from being ousted and losing his growing crop.—12 Amer. & Eng. Ency. of Law, 758c, § 5; *Warren v. Wagner*, 75 Ala. 188.

Langston's attorning to Salter terminated his tenancy with Griffin and put Salter in possession.—12 Amer. & Eng. Ency. of Law, 757y, § 4; *Warren v. Wagner*, 75 Ala. 188.

SHARPE, J.—In *Maxwell v. Pounds*, 116 Ala. 551, and again in *Marks v. Wood*, *ante*, p. 533, it was held that an execution issued from the circuit court having indorsed thereon a statement of the costs, but without itemization of the costs as required by section 1883 of the Code, is by the terms of that statute made void. In the same section the statement to be indorsed on the execution is referred to as a "copy of the bill of costs." Since there is no law requiring any officer of the circuit court to keep an itemized account of costs accruing in cases appealed from a justice court, we are of the opinion that the bill of costs which under the Code section referred to must be shown by items on executions from the circuit court, are such only as under the statutes are required to be kept by the officers of that court, and hence that the execution in question is not vitiated by the fact that among the items of costs indorsed thereon magistrates' fees purport to be shown only by a statement of their gross amount.

The doctrine of champerty which inhibits and makes void a sale of land in possession of a third person under a claim of right has no application to judicial sales. *Humes v. Bernstein*, 72 Ala. 546. It is immaterial, therefore, that defendant had through his tenants possession of the land when plaintiff's vendor Salter bought the land at the execution sale.

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As bearing on the question of whether Salter's conveyance to plaintiff was champertous the facts are as follows: The execution under which Salter bought was issued against Chesser on November 22, 1898. Defendant bargained with Chesser for the land in December following and placed tenants on it in that or the next month. He received a deed from Chesser which bears date as of December 6th, 1898, but which was not executed by delivery until April or May, 1899. Salter immediately after his purchase at execution sale demanded possession of defendant's tenants and they agreed to yield possession. Thereupon without leaving the premises those tenants rented the lands from Salter and thereafter they remained in attornment to Salter until he sold to plaintiff.

As a general rule a tenant is bound to recognize his landlord's title and being under the legal obligation to restore the premises to his lessor when he quits, his mere attornment to a stranger is ineffectual to break the continuity of the landlord's possession. But this rule is not without exceptions, one of which obtains where the landlord's right has been subsequent to the lease terminated by an execution sale.—*McCurdy v. Houston*, 74 Ala. 162; *Randolph v. Carleton*, 8 Ala. 606; *Pope v. Harkins*, 16 Ala. 321; *English v. Key*, 39 Ala. 113; *Otis v. McMillan*, 70 Ala. 46.

The law in such case terminates the tenancy and justifies the tenant in attorning to the execution purchaser without waiting for eviction. His attornment under such circumstances effects a legal transfer of the possession from the original landlord to the purchaser. The right acquired by Salter at the execution sale related back to the inception of the lien created by the issuance of the execution and so was prior to defendant's purchase. The lien culminated in the sheriff's sale and his deed conveyed to Salter such title as Chesser had on November 22, 1898, thereby defeating such right as defendant acquired thereafter by his purchase.—*Randolph v. Carleton*, 8 Ala. *supra*. The subsequent attornment of his tenants to Salter operated to transfer his possession to Salter, and it was not regained until after the latter

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conveyed to plaintiff. The evidence being free from material conflict, the jury were properly charged in favor of the plaintiff.

Affirmed.

138	548
137	270

133	548
138	283

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Bill in Equity to set aside and Cancel a Deed.

1. *Equity pleading; multifariousness.*—A bill in equity is not rendered multifarious by joining with matter proper for equitable action and relief other matters cognizable by courts of law.
2. *Bill to set aside conveyance on account of undue influence; necessary allegations.*—In a bill filed seeking to have set aside and cancelled a deed, upon the ground that its execution was obtained by undue influence, it is not necessary to allege with particularity the manner in which the result complained of was accomplished, but only that the deed was procured to be executed by undue influence exerted by certain named parties; since the inquiry in such a case is not whether the improper influence was sufficient to have coerced the will of a man of ordinary capacity and force of character, but only whether the influence, whatever it may have been, did, in fact, control the execution of the instrument involved in the controversy.
3. *Equity pleading; objection to bill raised for the first time in Supreme Court comes too late.*—Where a bill is filed to set aside and annul a deed conveying a life estate and an estate in remainder, and the life tenant and the remaindermen are both made parties defendant, and pending such suit the life tenant dies, and thereafter the case proceeds without objection on the part of the remaining defendants as if the life tenant had never been named as a party to the bill, there should be either a suggestion of the death of the life tenant and a discontinuance as to such party, or an amendment striking out the name as a party respondent; but if the objection to this not being done is not made while the cause

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is pending in the chancery court, but is made for the first time when the case is on appeal to the Supreme Court, such objection comes too late and will not be entertained.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. W. L. PARKS.

The averments of the bill and the facts of the case are sufficiently stated in the opinion. The respondent demurred to the bill as amended, among others, upon the following grounds: 1. Said amended bill is multifarious in that it seeks to have the deed referred to annulled and set aside on account of the mental incapacity of W. P. Bullock to execute the same, and at the same time to have the said conveyance annulled and set aside on account of undue influence exercised over W. P. Bullock, and at the same time have said conveyance set aside and annulled on account of the failure of the grantor therein to comply with the statutory requirements necessary for the conveyance of a homestead. 2. That said bill is repugnant and inconsistent in that it seeks to have set aside said deed on account of the mental incapacity of the grantor, W. P. Bullock, and at the same time affirms the mental capacity of the said grantor by seeking to have said conveyance avoided on account of the failure of the grantors to observe the statutory requirements in the execution of a homestead. 3. That it is not averred who exercised the undue influence. 4. It is not averred in what the undue influence consisted. There was also a motion to dismiss the bill for the want of equity.

Upon the submission of the cause upon the motion, demurrers and upon the evidence, the chancellor overruled the demurrer and rendered a decree granting the relief prayed for in the bill and ordered accordingly. From this decree the respondent appeals, and assigns the rendition thereof as error.

J. M. CHILTON, for appellant.—The bill in this case was without equity.—*Wood v. Craft*, 85 Ala. 263; *Miller v. Marx*, 55 Ala. 322; *Smith v. McGuire*, 67 Ala. 34; *Barnett v. Proakauer*, 62 Ala. 48.

The averments of the bill as to undue influence are not sufficient to give the court jurisdiction, such averments

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being the mere conclusions of the pleader.—*Shipman v. Furniss*, 69 Ala. 555; *Bancroft v. Otis*, 81 Ala. 287; *Gardner v. Knight*, 124 Ala. 273.

WATTS, TROY & CAFFEY, *contra*.—There is nothing in the motion to dismiss for want of equity.—*Scals v. Robinson*, 75 Ala. 353; *Hooker v. S. & M. R. R. Co.*, 69 Ala. 529; *Cahalan v. Monroe*, 56 Ala. 303.

The allegations of the bill as amended are sufficiently full and specific. The failure to have the wife acknowledge the deed separate and apart from the husband makes the deed inoperative in so far as the remainder conveyed is concerned, and that is the only estate now in question.—§ 2, Art. X, Constitution, 1875; *Hood v. Powell*, 73 Ala. 171; *Turner v. Bamburgh*, 95 Ala. 241.

Where the wife is superior in intellect and by reason of the confidence and trust of the husband in her, induces the husband to execute a conveyance, it will be set aside.—*Hollocher v. Hollocher*, 62 Mo. 267. See also *Witbeck v. Witbeck*, 25 Mich. 439. Weakness of mind in the grantor furnishes a ground of suspicion that improper influence has been used.—*Kennedy v. Marast*, 46 Ala. 161; *Burke v. Taylor*, 94 Ala. 530; *Jackson v. King*, 4 Cow. (N. Y.), 216.

The burden of proof to show that the deed was obtained by fair means is upon the respondent.—*Ferguson v. Lowery*, 54 Ala. 510; *Malone v. Kelly*, 54 Ala. 532; *Jenkins v. Bradford*, 59 Ala. 400; *Dickinson v. Bradford*, 59 Ala. 581; *Humphrey v. Barleson*, 72 Ala. 1; *Waddell v. Lanier*, 62 Ala. 347; *Shipmen v. Forniss*, 69 Ala. 555; *Burke v. Taylor*, 94 Ala. 530. See especially *McCartney v. Bone*, 33 Ala. 601; *Hill v. Barge*, 12 Ala. 687; 8 Encyc. of Law, pp. 1310, *et seq.*; 27 Ency. of Law, p. 453, n. p. 454; § 4 and n. 3, p. 461; n. to p. 466; Gifts, p. 475 and note; § 4, p. 516.

McCLELLAN, C. J.—This bill is filed by Bullock against the Letohatchie Baptist Church. It avers that Wm. P. Bullock, the uncle of complainant, in the year 1885, executed his last will and testament wherein there was a devise to Louisa A. Bullock of a life estate and to

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complainant the remainder estate in a farm, the land here involved, that Wm. P. died in 1897, and that his said will has been duly probated. It further avers that in 1890 said Wm. P. was stricken with paralysis and from thence to his death was unsound of mind, that shortly before his death he signed a deed of said farm purporting to convey a life estate therein to said Louisa A. and the remainder to said church, that as to the greater part of the land—160 out of 240 acres—this deed was void because it covered the homestead of Wm. P. and was not acknowledged by his wife, the said Louisa A. separately and apart from the husband, etc., as required by the statute; that as to the whole of the land this deed was invalid because Wm. P. was *non compos mentis* at the time he signed, and it was so invalid in whole for the further reason that said Wm. P. was induced to sign it through and by the exercise upon him to that end of undue influence by his said wife, one Beville, the pastor of said church of which Wm. P. was a member, J. W. Dickson and his wife, M. E. Dickson, or some of them. The prayer is for the cancellation of said deed *in toto*, or, if the court should find that Wm. P. Bullock was capable of executing the same, then for its cancellation as to that part of the land which constituted the homestead of said Bullock; and for general relief.

At the time of bill filed the complainant was not in possession of the land. The bill therefore has no equity in so far as it proceeds on the theory that Wm. P. Bullock was *non compos mentis* at the time he signed the deed for in that aspect complainant's remedy was plain, adequate and complete at law. And for the same reason the bill is without equity in so far as it rests the partial invalidity of the conveyance on the facts that a part of the land constituted the grantor's homestead and that the wife's separate acknowledgment was not taken: In that category of fact also, complainant's right and remedy were legal and not equitable. The third aspect of the bill, however, presents a case of purely equitable cognizance, the cancellation of the deed on the ground that Wm. P. Bullock was defrauded or coerced into signing it by undue influence. So that we have a bill present-

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ing the case in three alternative aspects, in two of which equity is without jurisdiction to grant relief, and the third presents facts for the interposition of the court of chancery. The joinder of these matters of legal cognizance with the matter of equitable jurisdiction is not of importance. "A bill cannot be rendered multifarious by joining with matter proper for equitable action and relief, another matter cognizable by courts of law."—*Yarborough v. Avant*, 66 Ala. 526; *Baines v. Barnes*, 64 Ala. 375; *McGriff & Oakley v. Alford*, 111 Ala. 634.

We, therefore, consider the present bill as one simply and only to set aside and cancel the deed signed by W. P. Bullock in July, 1897, for that it was procured to be signed by and through the bringing to bear upon him of improper and undue influence. In our opinion its averments are quite sufficient to the presentation of such a case. We have never understood it to be necessary to allege with particularity the *quo modo* the result complained of was accomplished, but only that it was accomplished by undue influence exerted by named persons. The inquiry is not whether the improper influence was sufficient to have coerced the will of a man of ordinary capacity and force of character, but only whether the influence whatever it may have been did in point of fact control the act in question—not whether it should have had the effect charged, but whether it *did* have that effect; and any influence which coerces an act in which the judgment and will of the actor do not concur, is undue influence. Hence it is that the averment should be rather of the result than of the particular and special acts and modes of causation. We are not of opinion that either the motion to dismiss or the demurrer to the amended bill should have been sustained.

The bill was filed originally against the church only, and sought to have the deed cancelled as to the remainder estate in the land, leaving the life estate of Mrs. Louisa A. Bullock to stand. We suppose this course was taken because she had the same estate under the will, and to cancel the deed as to her would therefore seem to be a vain and useless thing to do. But the respondent at once objected to the bill

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in this connection by demurrer for inconsistency, repugnance and what not, for that it confessed the validity of the deed as to one estate purporting to be conveyed by it and questioned it as to the other, etc., etc. The complainant thereupon in response, as it were, to this demurrer amended the bill by making Mrs. Bullock a party and praying the cancellation of the deed as a whole. But she never was served with process and never appeared in the case, the fact being that she died, and thereby put an end to the life estate before service could be had upon her. After this the case proceeded without objection on the part of the church as if Mrs. Bullock had never been named as a party to the bill at all. There was, of course, no occasion to revive against her personal representatives or heirs since nothing involved in the case passed to them. Technically there should have been a suggestion of her death and a discontinuance as to her, or perhaps an amendment striking out her name as a party respondent; and had any point been made in that behalf in the court below, doubtless the proper course to eliminate her from the cause would have been taken by the complainant. No such objection was there made; and we will not entertain it as it is now made for the first time on appeal in this court, especially as nobody's rights or remedies have in the least been prejudiced by her name remaining in the bill as that of a party respondent.

The evidence in the case is very voluminous, and conflicting. Much might be written upon it, but without serving any good purpose. It has been most attentively read and carefully considered; and from it we reach the conclusion that at the time Wm. P. Bullock signed the deed sought to have cancelled, he was a man of weak and impaired mind; that he was unduly influenced thereto by his wife, Louisa A. Bullock, and by his pastor, Dr. W. H. Beville, who were perhaps aided therein somewhat by other persons interested in the acquisition of the land by the church, that said deed was therefore voidable at the suit of the complainant. The fact that Mrs. Bullock and Beville stood to the grantor in relations of confidence and trust, while not necessary to the conclusion we have reached, gives additional strength to it.

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The averment in the bill that this undue influence was exerted with the intent to defraud the complainant we regard as surplusage, not necessary to be proved.

The decree of the chancellor must be affirmed.

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Bill in Equity for Reformation of Judgment.

1. *Bill for reformation of judgment; equity jurisdiction.*—A bill can not be maintained by one who was a party to an ejectment suit, for the purpose of having the judgment rendered in said suit reformed, so as to make it apply to other lands than those described in said judgment; said judgment being rendered in accordance with the plea of disclaimer and the suggestion of adverse possession for three years filed by the defendant in said ejectment suit, who sought to maintain the bill in equity.
2. *Equity pleading; dismissal of original bill carries cross-bill.* A cross-bill which shows no equitable relief growing out of the subject matter of the original bill, and which has no independent equity which would sustain the jurisdiction of the court, is carried out of court by the dismissal of the original bill.

APPEAL from the Chancery Court of Shelby.

Heard before the Hon. RICHARD B. KELLY.

The appellant, Ben Meyer, filed a bill against the appellants the Calera Land Co., Joseph Goetter, trustee, and others. The purpose of the bill was to have a judgment rendered in an action of ejectment reformed, so as to include certain lands and that it be decreed that the respondent's title to the lands described in the bill was, by said judgment, divested out of them and invested in the claimant, and that the respondents be enjoined from claiming title to said lands.

The defendants answered the bill and two of the defendants prayed to have their answer taken as a cross-bill. By this cross bill the complainants therein sought to quiet the title to the lands involved in the suit under the

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statute, (Code, §§ 809-813). The averments of the original and cross bills, and the facts of the case necessary to an understanding of the decision on the present appeal, are sufficiently stated in the opinion.

On the final submission of the cause, the chancellor decreed that the complainant was not entitled to the relief sought in the original bill, but that the defendant was entitled to the relief asked for in the cross bill; and he ordered accordingly. From this decree the complainant appeals, and assigns the rendition thereof as error.

A. LATADY, for appellant, cited *Tyson v. Decatur Land Co.*, 121 Ala. 414; *McQueen v. Lampley*, 74 Ala. 408; *Beebe v. Morris*, 54 Ala. 300; 3 Blackstone's Com., 233; Code of 1886, § 2699.

LACKLAND & WILSON, *contra*, cited 3 Brick. Dig., 347, § 230; 1 Brick. Dig., 666, § 376, *et seq.*; 2 Ency. Pl. & Pr., 1180, 1200, notes and authorities; *Davis v. Caldwell*, 107 Ala. 526; *Holt v. Adams*, 121 Ala. 664.

SHARPE, J.—Complainant's only claim to the land which forms the subject-matter of this suit grows out of proceedings had in an action of ejectment in which he was a defendant. The facts relating to that action are but meagrely stated in the bill, but therefrom it appears that at some previous time not stated, suit was brought by one Holt (who may have been, but is not alleged to have been in privity with defendants in this suit), against complainant's tenant in possession, for whom, complainant was substituted as defendant. From what is averred it is inferable though not distinctly alleged that as such defendant this complainant filed in that suit as to a part of the land sued for, a disclaimer, and as to another part a suggestion of three years adverse possession with a claim for improvements made by him with a view to recovering for the improvements or retaining the land under the provisions of the statute, (Code of 1886, § 2705, Code of 1896, § 1539); and further that by mistake of the pleader the land here involved was included in the disclaimer while the suggestion of adverse possession embraced, not the improved part, but

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another parcel of land on which there were no improvements. It is further shown that on the trial of that suit a verdict was rendered for the plaintiff in ejectment on the main issue, but the verdict found the suggestion of adverse possession for three years to be true, and assessed the value of the land as therein described and of its use, and the value of complainant's improvements and on that verdict a judgment was formally rendered. Further it is alleged in substance that the plaintiff in ejectment failed to pay for the improvements and after the year allowed by the statute for such payment, he, the complainant, paid to the clerk the assessed value of the land. By the bill it is not sought to set aside that judgment as one obtained by mistake, but complainant bases thereon an assertion of right as created by the Code of 1886 to the land on which the improvements are located; and to the end of establishing that right he seeks to have the judgment so reformed that the suggestion of adverse possession and the assessment of values will properly describe and apply to that part of the land.

Regardless of whether the Code of 1886 or the changed statute in the Code of 1896 applied to the ejectment proceedings, it must be held that the bill presents no case for equitable relief. The judgment in ejectment did not provide for complainant to obtain on any terms an interest in lands not described in the suggestion of adverse possession; and whether there was in it a misdescription of land by mistake or not, the chancery court has no jurisdiction to reform that judgment so as to make that description apply to the land here in question. The case is ruled by *Stephenson v. Harris*, 131 Ala. 470, where the lack of such jurisdiction is declared and authorities supporting the conclusion are referred to.

The decree appealed from is correct in so far as it ascertained the complainant had shown no interest in this land, but it should have gone further to the dismissal of both the original and cross-bills. The original bill as amended has not specific averments of peaceable possession in complainant and the absence of pending suits such as are necessary to confer on the court the statutory jurisdiction to quiet title.—Code, §§ 809, 810. Nor does it call on defendants to set forth their title as pro-

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vided in those sections. As to the essentials of a bill which would pursue the statutory remedy see *Adler v. Sullivan*, 115 Ala. 582; *Slosson v. McNulty*, 125 Ala. 124. The defendants' title cannot be adjudicated upon their answer alone as it might have been if exhibited pursuant to a demand made under the statute.

There is no feature of the cross-bill which relieves it from the general rule whereby a cross-bill having no independent equity is carried out by a dismissal of the original bill, as to which see *Etowah Mining Co. v. Wills Valley, etc. Co.*, 121 Ala. 672, and authorities there cited. The independent equity which may warrant retention of a cross-bill in such case is one springing from matters connected with those of the original bill, and which can uphold the jurisdiction and merit relief apart from that sought by the original bill. This cross-bill has no such independent equity. So long as the cross-complainants are out of possession and can test their title at law they are not entitled to bring it in equity for adjudication. Moreover, the title they ask to have quieted is distinct from complainant's claim and for that additional reason is not in this case a proper subject for a cross-bill.—*Gage v. Mayer*, 117 Ill. 632. A cross-bill lies only in respect of matters germane to those of the original bill.—*Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *O'Neil v. Perryman*, 102 Ala. 522; 5 Ency. Pl. & Pr., 640.

The decree of the chancery court will be affirmed as to that part which ascertains complainant had no interest in the land and charges him with costs in that court, and that part which declares a right in the cross-complaints to relief will be reversed. This court will render a decree dismissing the cross-bill and directing that the costs of the appeal in this court and in the chancery court be taxed one-half against the appellant and one-half against the appellees.

Affirmed in part, reversed in part, and rendered.

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142 558**McKissack v. McClendon *et al.****Action for Breach of Sheriff's Bond.*

1. *Sheriff; sufficient execution of sheriff's bond.*—Where a sheriff, before entering upon the discharge of his duties as such officer, prepares his official bond, writing his name and the name of his sureties in the body of the bond, but through oversight fails to sign the bond as principal obligor, though the same was signed by his sureties, and the bond so filled out and signed was by said sheriff delivered to the probate judge and was approved and recorded by him as said sheriff's official bond, and he, thereupon, entered upon the discharge of his duties as such sheriff under said bond, and acted as said sheriff, such bond, as to the sureties signing it stands, under the provisions of the statute, (Code, § 3089) in the place of the official bond of the sheriff subject, if its conditions are broken, to all the remedies which the person aggrieved might have maintained on the official bond of such sheriff, executed, approved and filed according to law. (Tyrson, J., *dissenting.*)

APPEAL from the Circuit Court of Henry.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by the appellant, R. L. McKissack, against the appellee, W. A. McClendon, as sheriff and the sureties on his official bond and sought to recover for the breach of a bond in making a wrongful levy of writs of attachment upon the property in the possession of the plaintiff. The defendant pleaded the general issue and several special pleas. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

Upon the introduction of all the evidence the court, at the request of the defendants, instructed the jury as follows: "If the jury believe the evidence, they must find for the defendants." To the giving of this charge the plaintiff duly excepted.

There were verdict and judgment for the defendants. The plaintiff appeals, and assigns as error the

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giving of the general affirmative charge requested by the defendant.

WILLIAM C. OATES and WALKER & THOMPSON, for appellants, cited Code of 1896, §§ 3087, 3089, 3090; *State v. Flynn*, 77 Ala. 100; *Hall v. LaFayette Co.*, 69 Miss. 530; *McLeod v. State*, 69 Miss. 221; *Painter v. Mauldin*, 119 Ala. 89; *City v. Moore*, 86 Me. 181.

H. A. PEARCE, W. W. SANDERS and SOLLIE & KIRKLAND, *contra*.—The bond or instrument, the basis of the suit, is not a statutory bond, nor does it come within the cases mentioned in sections 3089 and 3090 of the Code.—*Painter v. Mauldin*, 119 Ala. 88; *Lewis v. Lee County*, 66 Ala. 480; *Gay v. Murphy*, 56 Am. St. Rep. 496; *Board v. Sweeney*, 1 S. D. 642.

DOWDELL, J.—This is an action against the sheriff on his bond as such for the breach of said bond. There is but one question in the case, and that is, whether the obligors in said bond are liable on said bond as a statutory bond.

The defense is rested upon the fact of the failure of the sheriff, McClendon, the principal obligor, to sign the bond.

The facts show that the defendant, McClendon, before entering upon the discharge of his duties as sheriff, to which office he had been elected, procured and obtained from the judge of probate a form, or blank bond, to be filled out by him as his official bond, and executed with proper sureties; that he filled out said bond, writing his own name three times, and the names of the sureties in the body of the bond, but through oversight failed to sign the bond as principal obligor, though the same was signed by the appellees here as sureties; that the bond so filled out and signed, was by the said McClendon delivered to the probate judge for approval as the said sheriff's official bond, and was duly approved and recorded by the probate judge of Henry county; that said McClendon entered upon the discharge of his duties as such sheriff, having otherwise qualified by taking the oath of office, under said bond, and acted as sheriff

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and was acting as such under said bond, at the time of the breach complained of.

In *Sproul v. Lawrence*, 33 Ala. 674, which like the present case, was an action on the sheriff's bond, and where the bond had not been filed and approved as required by the statute, it was said by this court, in construing section 132 of the Code of 1852, being the same as section 3089 of the present Code (also sections 120 and 126 of the former Code, which are the same as sections 3072 and 3073 of the present Code): "An examination of the various provisions of the Code, in reference to the bonds of public officers, will satisfy any one of the studious solicitude with which the legislature has sought to afford the most ample protection to all persons interested in the performance by such officers of their official duties. The section we are considering is a part of the legislation designed to effect this general object; and it is our duty to put upon it such a construction, as will harmonize with the substance and spirit of the text to which it belongs. It is a remedial statute; and we must construe it largely and beneficially, so as to suppress the mischief and advance the remedy; or in the language of Lord COKE, so as 'to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*'"; citing *Heydon's case*, 3 Rep. 7; Sedgwick on Statutes, 359-60. "It must be admitted that the words of this section, [§ 132, Code, 1852, § 3089, Code, 1896] are not as clear and precise as they might be; and it is a well settled rule, that when the words are not precise and clear, such construction will be adopted as shall appear the most reasonable, and best suited to accomplish the object of the statute; and a construction which would lead to an absurdity ought to be rejected."

In that case it was argued by counsel, as here, that inasmuch as the bond was in the penalty, payable and conditioned, with sureties of requisite qualification and sufficiency, as prescribed by law, the defect, namely: (in that case) that it was not "approved and filed according to law," (in the present case) that the bond was not signed by the principal obligor (the sheriff), was not one of the defects or omissions specified in the

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statute, and consequently did not fall within the provisions of that statute. Without reiterating what was said in *Sprowl v. Lawrence*, *arguendo* in response to the insistence of counsel, we further quote from that case on page 687, where it was said in conclusion on that proposition: "This section, therefore, in our judgment, applies to a bond which does not conform to any of the statutory requirements, either as to its penalty, payee, conditions, approval, or filing, provided the officer executing it has acted under it. Much more clearly does it apply to a bond which the officer executing it has acted under, and which does conform to all the requirements of the law, except the last two—approval and filing. To hold otherwise, would be to maintain the paradox, that the validity of the bond is enhanced by its increased imperfections—that a total is less hurtful than a partial departure from the statute, and that an instrument in fact gets better as it grows worse." The approval and filing is as much a requirement of the statute, as the signing by the sheriff, the principal obligor, and yet neither is among the omissions specified in the section. The fact, that the sheriff acted under the bond as his official bond, is made the controlling principle under the reasoning employed in *Sprowl v. Lawrence*, *supra*. We can see no difference in principle between that case and the one at bar.

In *Steele v. Tutwiler*, 68 Ala. 107, the court, after citing approvingly *Sprowl v. Lawrence*, *supra*, says: "We construe the phrase then, 'a bond, which is not payable or conditioned as prescribed by law,' as having reference to irregularities or imperfections in both the *body* and the *condition* of the bond; and as there can be no legal bond at all without signatures, the statute has, also, necessary reference to any want of formality, or imperfection, in the execution or signing by the obligors." The summary proceeding in that case on the bond was sustained.

Under the principle laid down in these cases, our conclusion is, that the bond here, as to the sureties signing it, stands in the place of the official bond of the sheriff, subject on its condition being broken to all the remedies which the person aggrieved might have maintained on

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the official bond of such officer, executed, approved and filed according to law.—§ 3089.

The case of *Painter v. Mauldin*, 119 Ala. 88, where the guardian's bond was held not to be a statutory bond, but good as a common law obligation, as to the sureties, is distinguishable from the present case, in this, that a guardian's bond does not fall within the provisions of section 3089.

It is of no consequence that the sureties did not know of the failure of the sheriff to sign said bond, and that he was acting under it, without having first signed the same. They signed it for the purpose of his acting under it, and he having acted under it, they became bound by it.

The court erred in giving the general charge requested by the appellees, and for this error the judgment will be reversed and the cause remanded.

TYSON, J., *dissenting*.—While I concur in a reversal of the judgment in the cause, I cannot assent to the principles announced in the opinion of the other members of the court. They hold the sureties upon the bond sued upon liable, and exonerate their principal from liability on the ground that he did not sign the bond. And this they do by virtue of section 3089 of the Code. They implicitly concede that were it not for the provisions of that statute, that the sureties could not be held liable, thus recognizing the principle that a surety is never answerable upon an undertaking unless his principal is bound thereby—a principle thoroughly settled by the decisions of this court. In *Evans v. Keeland*, 9 Ala. 46, it is said: "The contract of suretyship has been defined to be, a contract whereby one person engages to be answerable for the debt, default, or miscarriage of another. It is an obligation *accessorial* to that of the principal debtor: the debt is due from the principal, and the surety is merely a guarantor for its payment. * * * A corollary from this definition is, that it is of the essence of such a contract, that there be a valid obligation of the principal debtor. And as upon a recovery by the creditor against the surety, he could reimburse himself by a suit against his principal, it also results necessarily that the

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surety may, in general, make any defense which his principal could make." See also *White v. L. Asso. of America*, 63 Ala. 424; *State v. Parker*, 72 Ala. 183. The holding of the majority of the court followed to its logical conclusion, necessarily results in imposing a liability upon the sureties never contracted by them and leaving them without a right of reimbursement from their principal. In other words, if they have no principal, they have no right to reimbursement. It destroys an essential element of the contract of suretyship and makes the sureties liable as principal—an obligation never assumed by them. Neither of the cases which they cite and quote from in support of their contention, go to the length that they have gone in this case. In both of those cases, the bond was signed by the principal. Indeed, in *Sprowl v. Laurence*, the learned judge was careful not to extend the provision of the statute to a bond which the officer had not signed, as is clearly shown by the exception engrafted by him upon the general doctrine he announced. For he says: "This section, therefore, in our judgment, applies to a bond which does not conform to any of the statutory requirements, either as to its penalty, payee, conditions, approval or filing, *provided*, the officer *executing* it has acted under it." That this is the proper construction of the statute is made apparent from its language. It reads: "Whenever any officer required by law to give an official bond, acts under a *bond* which is not in the penalty," etc. How can it be said that an officer acts under a bond when he has never executed it? It is no bond at all unless it is signed by a principal. And this is made the plainer when we read further in the statute this language: "Such bond is valid and binding on the obligors therein." Again we have at least an implied, if not an express, recognition that there must be an official bond with obligors on it. And as said above if the principal did not sign it, we have no bond and no obligors. For by no rule of construction can the statute be converted into an instrument for the purpose of creating a bond which has never been executed. Furthermore it seems to me entirely clear that the words "such bond" mean official bond. How is it possible to have an official bond when the official whose

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duty it is to give it has never signed it? My conclusion, therefore, is, that unless the principal is bound, the sureties are not.

But I do not concur in the opinion that McClendon, the principal, is not bound. It is clear to my mind that upon the facts stated in the opinion of the majority of the court, as to whether he signed the bond is a question which should be submitted to the jury. It is of no importance that he did not affix his name at the bottom of it. He is only required to "give bond with surety," no formality as to its execution being prescribed by the statute.—§ 3735 of Code. Nor is a seal necessary to its efficaciousness.—§ 9 of Code. In regard to the place of signature, there is no restriction. It may be at the top, or in the body, as well as at the foot. The material question is, whether or not he wrote his name in the body of the bond with the intention to be bound by it. It is true, it may be, that if he intended a further signature at the bottom, and this fact appeared beyond adverse inference, that the court would be at liberty to say, as matter of law, that he had not executed it. But in the absence of any legal testimony showing that he intended a further signature, it cannot be affirmed as matter of law under the facts of this case that he did not intend when he wrote his name in the body of the bond, that his act in doing so should not be his signature—a signing of it by him. And indeed, if the record contained positive evidence that he intended to affix his name at the bottom as a final signature, as to whether he signed it would still be a question for the jury under the facts of this case, for the obvious reason that notwithstanding this positive evidence, the jury would have the right to infer from his acts and conduct, in writing the bond himself, procuring the sureties to sign it, delivering it as his act and deed to the probate judge, and acting under it as though it had been formally executed by him, that he intended by the act of writing his name in the body of it, to be his signature. In *Penniman v. Hartshorn*, 13 Mass. 87, one of the questions involved was whether the contract for the sale of merchandise was a sufficient memorandum in writing, signed by the defendant, so as to satisfy the

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second section of the statute of frauds of that State, which provided that "no contract for the sale of any goods, etc. for the price of ten pounds or more shall be allowed to be good, except the purchaser shall accept part of the goods so sold and actually receive the same, or giving something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The memorandum was signed at the top instead of at the bottom by the purchasers of the goods, who were sued by the seller in assumpsit for a breach of the contract, and this was made the basis of the objection to it. The court said, after stating the ground of objection: "But we think this a slight objection; as it is well known that such a signing has been held good in instruments of much more importance and solemnity than the one before us." In *Saunderson v. Jackson*, 2 B. & P., Lord ELDON held, that a bill of parcels in which the vendor's name is printed in the body, delivered to the vendee by him at the time of an order given for the future delivery of goods, was a sufficient memorandum of the contract within the statute of frauds. In *Johnson v. Dodgson*, 2 M. & W., *p. 660, Lord ABINGER said: "The cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." In *Holmes v. Mackrell*, 3 Common Bench Rep. (N. S.), *p. 789, COCKBURN, C. J., said: "The only question that remains is, whether there is sufficient signature. The defendant does not, it is true, put his name at the bottom of the document. But the whole is in his handwriting, and he has affixed his name at the top. I entertain no doubt that this is a sufficient signature." In *Ogilvie v. Foljambe*, 3 Merivale, 52, the name of the party attempted to be charged was written in the body of the paper by himself as here, and the court held that it was a sufficient signing, as "it does not matter in what part of the instru-

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ment the name is found." In *Schneider v. Norris*, 2 M. & S. 286, Lord ELLENBOROUGH held that a bill of parcel in which the name of the vendor is printed and that of the vendee written, was a sufficient signing by the vendor. In *Knight v. Crockford*, 1 Esp. 190, the agreement sought to be enforced was written by the party attempted to be charged, and was in this language: "I, James Crockford, agree," etc. The court held it a sufficient signing by Crockford. In *Higdon v. Thomas*, 1 H. & G. (Md.) 139, in a very learned and exhaustive opinion in which all the cases are reviewed, the court held: "A bond which recited the names of the parties to, and the terms of a contract for the sale of land, and contained a condition to secure a performance of such contract prepared and written by the vendee, who was also the obligee of the bond, executed by an agent of the vendor, and delivered by him to the vendee," was a sufficient signing by the vendee. In *Clason v. Bailey*, 14 Johns. (N. Y.) 484, the defendant's name only appeared in the body of the agreement, which was written by his authorized agent. The court held that he had signed it. In *McConnell v. Brillhart*, 17 Ill. 354, a bill was filed to enforce the specific performance of a contract relating to lands. The court said: "The signing will be sufficient in the caption, or body of the memorandum, or by a subscription to it." In *Wise v. Ray*, 3 Green (Iowa), 439, it was held, where an instrument was written by R. and subscribed by W. and stipulates that W. has sold and agreed to deliver pork to R. at the place and price mentioned in the undertaking, that R. was bound; the signature in the body being written there by him. The same doctrine was recognized in the case of *McMillen v. Terrell*, 23 Ind. 163, and recognized and enforced by the Supreme Court of the United States in *Barry v. Coombe*, 1 Peters, 640. See also Browne on Statute of Frauds, (5th ed.), § 357; 2 Bouv. Law Dict. p. 1001; Roberts on Frauds, *p. 125, top p. 125; 1 Green. on Ev. (16th ed.), Appendix 2, § 268, p. 855; 8 Am. & Eng. Ency. Law (1st ed.), 717.

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Jones v. Nolen.*Statutory Claim Suit.*

1. *Garnishment; interposition of claim.*—In response to a writ of garnishment issued upon a judgment, the garnishees answered indebtedness to the defendant, but suggested a third party as claimant. In the claim suit instituted, it appeared that the indebtedness of the garnishees was evidenced by note made to the defendant, that this note was given for the purchase of lands belonging to the defendant's wife, and by mistake was made payable to him; that immediately upon its delivery to him and before the issuance of the writ of garnishment, the defendant indorsed the note to his wife, who, after the service of the writ of garnishment, transferred and endorsed it to the claimant. *Held:* That the plaintiff in the judgment was not entitled to condemn the amount due from the garnishees on the note to the satisfaction of his judgment.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. N. D. DENSON.

The appellant, T. R. Jones, recovered a judgment in the circuit court of Tallapoosa county on August 9, 1892, against E. W. Massengale. Upon this judgment a writ of garnishment was sued out, on August 16, 1898, and served upon H. C. Thomas and others. In answer to the writ of garnishment, the garnishees answered that H. C. Thomas had bought from E. W. Massengale, the defendant in judgment, a house and lot, and after paying a part of the purchase money in cash, said Thomas and the other garnishees executed a note to E. W. Massengale for the balance of the purchase money; that the note was executed on August 15, 1898, the date of the purchase, and was payable August 15, 1899. The garnishees suggested that they had been notified that S. J. Nolen claimed an interest in said note. Nolen propounded his claim and the cause was tried upon issue joined upon the interposition of said claim. The judgment recovered by the plaintiff against E. W. Massengale was introduced in evidence. There

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was evidence for the claimant showing that on January 3, 1889, W. M. Ross and his wife, conveyed by deed to Mattie P. Massengale, the wife of E. W. Massengale, the property which was sold to Thomas. E. W. Massengale negotiated the sale of this property to Thomas, and that the note executed by Thomas and the other garnishees was made payable to E. W. Massengale; that upon the delivery of this note to E. W. Massengale, and upon his discovering that it was made payable to him, he immediately indorsed it to his wife on August 15, 1898, which was before the issuance and service of the writ of garnishment. On September 7, 1898, said Mattie P. Massengale transferred said note to S. J. Nolen, and indorsed the same to him. E. W. Massengale, as a witness for the claimant, testified that the lands purchased from Ross were paid for with money belonging to his wife, and that it was for this reason that the deed was made to her.

Upon the introduction of all the evidence, the court at the request of the claimant, gave the general affirmative charge in his behalf, to the giving of which charge the plaintiff duly excepted.

There were verdict and judgment for the claimant. The plaintiff appeals, and assigns as error the giving of the general affirmative charge requested by the claimant.

SORRELL & SORRELL, for appellants.

H. J. GILLAM, *contra*, cited *Rowland v. Plumber*, 50 Ala. 182; *Grantham v. Payne*, 77 Ala. 584.

MCCLELLAN, C. J.—Plaintiff's debt against E. W. Massengale does not appear to have been in existence on January 3, 1889, when the deed of Ross and wife was executed to Mrs. Massengale. There is, therefore, no presumption that E. W. Massengale, the husband, paid the consideration of that deed, and the burden of proving that to be the fact was on the plaintiff. This burden he failed to discharge; and, on the other hand, the evidence for the claimant went to show affirmatively that the land was paid for by Mrs. Massengale with

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her own funds. On this state of case the plaintiff was not entitled to condemn the amount due from the garnishees on the note executed by them to Messengale and transferred by the latter to his wife to the satisfaction of his judgment against Messengale, it being shown that this note was for the purchase money of her land, had been executed to Messengale by mistake and assigned by him to her in rectification of the mistake. The court properly gave the affirmative charge for the claimant. Affirmed.

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Bill in Equity to abate a Nuisance.

1. *Nuisance; when bill can be maintained by private citizen for its abatement.*—A nuisance which operates to destroy the health of a family or to seriously diminish the comfortable enjoyment of a dwelling house, is productive of irreparable damage and mischief, for which the law furnishes no adequate remedy; and a person whose health or the comfort of whose house is damaged and affected thereby, may maintain a bill for the purpose of abating such nuisance.
2. *Same; same; mill dam.*—Where the erection of dams or other obstructions which materially affect the natural flow of a running stream, results in the injury to the health of persons living in the neighborhood, or in the vicinity, such dam or obstruction, constitutes a nuisance, and may be abated by bill in equity at the suit of a person, the health of whose family is injured thereby, without waiting the trial of the issue of the nuisance *vel non* by an action at law.
3. *Same; same; same.*—Where a bill is filed to have a mill dam abated as a nuisance, upon the ground that it results in producing ill health in the family of the complainant and in the vicinity contiguous to the dam, the fact that the malaria which caused the ill health complained of was generated in part by other causes than the mill dam, constitutes of itself no defense to the maintenance of the bill, if it is further shown that the existence of the mill dam materially contributed to the condition naturally existing, producing malaria, and intensified or made more poisonous the malaria generated by other causes.

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4. *Bill filed to abate mill dam as a nuisance; estoppel.*—Where a bill is filed seeking to have abated as a nuisance a mill dam, the facts that the complainant at the time of the erection of said dam consulted with the defendant and advised him as to the manner of its erection and was aware that the defendant was expending money in the construction of said dam, and the mill which was to be operated by the pond caused from the dam, do not work an estoppel upon the complainant to maintain such bill, upon the ground that the maintenance of such dam produced ill health in the family of the complainant and of other people in the vicinity; and such facts constitute no defense to such bill.

APPEAL from the Chancery Court of Henry.

Heard before the Hon. W. L. PARKS.

The bill in this case was filed by the appellee, Alex. Daugherty against the appellant, Henry Richards, and prayed to have a mill dam and mill pond abated as a nuisance. The averments of the bill and the grounds of demurrer reviewed, and the ruling of the chancellor upon the demurrer are sufficiently shown in the opinion.

In the respondent's answer to the bill, after setting out the facts in denial of the mill and dam constituting a nuisance, there is contained the following paragraphs: "7. Respondent avers that said mill pond was made for the purpose of operating a grist mill for the public by water power, and that the same is largely patronized by the public; that it has been in active operation for 9 or 10 years in its present capacity and condition, and on the site now occupied by the same; that when it was in process of construction complainant was present and knew of its erection, and made no objection thereto; that he advised with respondent about the plans of construction and erection of the dam and operation of the mill and counselled and suffered large expenditures to be made in the improvement of the said mill and dam, without protest or objection, and is now estopped to deny the right of this respondent to continue the existence and operation of said water mill and the maintenance of the mill pond connected therewith." "8. That respondent's mill pond is fed exclusively by a spring or springs of natural lime water

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flowing from the side of the hill about 80 yards from the dam constructed by him; that the waters from the spring empty into the pond within ten feet of the boil; that the mill pond is composed of three small ponds covering collectively about one and one-half acres, and that the entire mill pond and stream above the pond and springs are all on this respondent's lands, and at no point either above or below the dam, are any of complainant's riparian rights affected; that the banks of said pond are nearly precipitate, and that at no time does the amount of water in the pond vary more than one and one-half feet in depth; that the mill is operated every day in the consumption of the water, that a day's grinding lowers the water to the extent above set out, and that at night when the mill is shut down that the water from the spring raises the pond to its normal height, so that the amount of the water varies with the day and night and not with the wet and dry seasons of the year; that the pond is free from green and growing vegetation; and that the water in said pond is never so lowered that any appreciable portion of the bottom and whatever of decaying vegetation there might have accumulated, is exposed to the sun."

The complainant filed separate exceptions to each of the paragraphs numbered 7 and 8 upon the grounds: 1st. That said paragraphs constituted an insufficient answer to the bill. 2d. Because said paragraphs did not deny the allegations which gave complainants' bill equity, neither do they set forth any facts to avoid the legal effect of the allegations of said bill.

The respondent moved the court to strike the complainant's exceptions to paragraphs 7 and 8 of respondents' answer.

Upon the submission of the cause on the motion of the respondent to strike plaintiff's exceptions to paragraphs 7 and 8, the court overruled said motions and ordered that the plaintiff's said exceptions should be sustained. The other facts of the case necessary to an understanding of the decision on the present appeal, are sufficiently stated in the opinion.

On the final submission of the cause on the pleadings and proof, the chancellor decreed that the com-

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plainants were entitled to the relief prayed for, and ordered accordingly.

The defendant appeals and assigns as error the several decrees rendered by the chancellor.

R. D. CRAWFORD, for appellant, cited 14 Ency. Pl. & Pr. 1137; *Ogletree v. McQuagg*, 67 Ala. 580.

ESPY, FARMER & ESPY, *contra*.—There was no error in overruling appellant's demurrer to appellee's original bill. See *Hundley v. Harrison*, 123 Ala. 292; *Ogletree v. McQuaggs*, 67 Ala. 580.

The decree of the chancellor overruling appellant's motion to strike appellee's exceptions to his answer and sustaining appellee's exceptions to his answer and the final decree rendered in the cause are free from error. See *Hundley v. Harrison*, *supra*; *Ogletree v. McQuaggs*, *supra*; *The State v. Rankin*, 16 Am. Rep. 737; *Neal v. Henry*, 33 Am. Dec. 125; *Frost v. Berkley Phos. Co.*, 46 Am. St. Rep. 736.

TYSON, J.—The bill in this cause seeks to have abated an alleged nuisance. It is shown by its averments that the respondent by the erection of a dam, for a grist mill, across flowing streams formed the mill ponds sought to have removed. On the borders or shores of these ponds there is a growth of trees that produce annually a heavy foliage, consisting of leaves and moss, which when killed by the winter's cold, fall into the ponds; also there are a large number of logs, stumps, and trees in these ponds which are continuously undergoing a state of decomposition. During the rainy seasons the respondent by means of the dam collects a large body of water which covers up this decaying vegetable matter, and while in this condition a thick slimy scum accumulates upon the surface of the water in these ponds. During the dry seasons the respondent in operating his mill uses a large amount of water from the ponds, thus reducing their area. By thus turning the water off and on, the decaying vegetable matter in the ponds is exposed to the rays of the sun, which, it is averred, produces malaria. The malaria thus generated

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causes diseases in the neighborhood and vicinity contiguous to the ponds, and especially in the family of the complainant, who resides upon his own lands within a short distance of them, and whose residence was where it now is, before the ponds were constructed. Before the construction of this dam the health of the community and especially that of complainant and his family was good, but since its erection there has been a great deal of sickness in the neighborhood and also in the family of complainant, caused by malaria produced by the ponds.

It is averred that the mill and dam were erected without an order of the probate court of the county in which they are situate.

A demurrer assigning several grounds was interposed to the bill, which was overruled. Only two of these grounds are insisted upon: 1st, that the nuisance sought to be abated is public in its nature, and that complainant fails to show any special injury to himself; and, 2d, the bill seeks to have the court determine the question of nuisance *vel non*—an issue which should be submitted to the jury. Both of these insistences are decided adversely to the appellant in the case of *Ogle-tree v. McQuaggs*, 67 Ala. 580. It is there said: "When the nuisance operates to destroy health, or to diminish seriously the comfortable enjoyment of a dwelling house, it is in its nature and consequences productive of irreparable mischief for which the law can furnish no adequate remedy. * * * The erection of dams or other obstructions, in such manner as to affect materially the natural flow of the water to the manifest injury of the lands of other riparian proprietors, or to injure materially the health of those residing in the vicinity, the court has enjoined without awaiting the trial of an issue at law, or until there was a trial of the issue. * * * Every man has a right to the undisturbed enjoyment of his property, especially to dwell in his homestead freed from the peril of disease and death, caused by artificial constructions erected by his neighbor on his own lands, whatever may be the purpose of such constructions. The right is imbedded in the common law maxim of such frequent use—*sic utere tuo ut alienum non laedas*."

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The deleterious consequences, stated in the bill, alleged to have resulted in consequence of the erection of the dam certainly make these ponds a public nuisance. But they are also, as to the complainant, a private nuisance—of special injury to him, since they materially affect the comfortable enjoyment of his home and are a constant and continuing menace to the health of himself and family. The fact that the malaria produced by these ponds also affects the health of others who reside in the vicinity of them, does not lessen the injury done to complainant, nor merge it in that of which the public may complain.—*Ogletree v. McQuaggs*, *supra*. See also *Grady v. Wolsner*, 46 Ala. 381; *Hundley v. Harrison*, 123 Ala. 292, and cited therein and quoted from, *Neal v. Henry*, 33 Am. Dec. 125.

The demurrer was properly overruled.

While respondent made a motion to strike the exceptions filed by complainant to paragraphs 7 and 8 of his answer, the point is not made that under the rule (34 of Chancery Practice, p. 1209 of Code), it is not such an answer to which an exception could be taken for insufficiency. By written agreement of the attorneys of record, the exceptions to these paragraphs were submitted to the chancellor for decision, instead of to the register as required by the rules of practice in a proper case.—Rules 35-38 of Chancery Practice, p. 1209 of Code. Treating this matter as the attorneys have treated it, the single question presented is, whether the matters and things set up in these paragraphs are a defense to the bill. A mere cursory examination of them will show that they are not. While an estoppel in round terms is alleged, the facts constituting it, if it be conceded that such a defense could under any circumstances be invoked to a bill of this nature and character, are clearly not sufficiently stated or averred.

There can be little doubt, under the evidence, that the ponds sought to be removed produced malaria, and caused disease in the community of people who reside near them, and that the complainant's family have suffered in consequence of having contracted malarial troubles. It is insisted by respondent that the malaria which caused the members of the family of the com-

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plainant to have had chills and fevers, was in part, if not entirely, generated by other natural ponds in that vicinity and the decay of pine trees, boxed for producing turpentine. Conceding for the purpose of this discussion that respondent has shown that the ill health of the community was in part the result of other causes than the malaria arising from these ponds, this does not relieve him of the duty imposed upon him by law of using his own land in such manner as not to injure his neighbor. And if these ponds materially contribute to the condition naturally existing productive of malarial diseases and intensify or make more poisonous the malaria generated by the other causes, the respondent has no right to maintain them.—*Frost v. Berkeley Phos. Co.*, 46 Am. St. Rep. 736. That they do, is admitted by the respondent in his own testimony.

We are clear to the opinion, upon the whole evidence, that the complainant is entitled to the relief sought by his bill.

Affirmed.

Equitable Mortgage Co. v. Finley *et al.*

Bill in Equity to foreclose Mortgage.

1. *Foreclosure of mortgage; when decree failing to pass upon claim under adverse possession proper.*—Under a bill filed for the sole purpose of the foreclosure of a mortgage, where it is alleged that the mortgagor died intestate, and the parties defendant are the sole heirs of the deceased mortgagor, but one of the defendants sets up in her answer a title to the mortgaged property claimed to have been derived by adverse possession, a decree providing for the divestiture by foreclosure of all the interest in the mortgaged property shown by the bill to be in the defendants as heirs at law of the deceased mortgagor, but fails and declines to pass upon the alleged title of the defendant claimed by adverse possession, expressly excepting from its operation any interest said defendants may have had in the mortgaged property, independ-

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ent of the mortgagor, is proper and free from error; the bill not assailing the title of said defendants claimed to have been derived through adverse possession.

2. *Same; same.*—In such a case, the purpose of the foreclosure suit being not to determine in whom the title resides, but to settle the interest claimed or existing in subordination to the mortgage, the defendant asserting the title by adverse possession was a proper party defendant, and the bill should not have been dismissed as to her; since, being an heir of the mortgagor, she took an equity of redemption, and the foreclosure of that interest was necessary to the enforcement of the mortgage.

APPEAL from the Chancery Court of Chambers.

Heard before the Hon. RICHARD B. KELLY.

The bill was filed in this case by the Equitable Mortgage Company to foreclose a mortgage executed to complainant, a foreign corporation, by Rebecca H. Finley, and her son, Henry Finley. The respondents are said Henry Finley and one Maria Finley, his sister, the bill averring that they are the sole heirs of said Rebecca H. Finley, who died intestate since the execution of said mortgage, owning no property except the lands embraced in said mortgage, and owing no debts, and that no administration has been had on her estate, and that none is necessary.

There was a decree *pro confesso* against Henry Finley. Demurrers were interposed by Maria Finley and were overruled by the court.

Answer under oath having been waived, the respondent Maria Finley filed an unsworn answer, denying the execution of said mortgage by Rebecca H. Finley, and its acknowledgment by her, and charging that at the date of the execution of said mortgage, the said Rebecca H. Finley was *non compos mentis*, and incapable of contracting with reference to her property. The answer also sets up and claims for respondent a title adverse and paramount to the mortgage; alleging that respondent had been in the quiet, peaceable, undisturbed possession of the lands described in the bill, claiming them as her own, for more than twenty years before the filing of the bill; also, that she had been in the open, notorious, adverse possession thereof for more than ten years be-

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fore the filing of said bill; also, that at the date of said mortgage, and at the time of its execution by Rebecca H. Finley and Henry Finley, respondent was in the adverse possession of said lands, holding them as her own, and adverse to the grantors therein, and that she is now in the adverse possession of said lands, holding them as her own and adverse to the grantors therein, and that she is now in the adverse possession of said lands under color of title, claiming them as her own.

These were the issues as made by the pleadings. On all of these issues, there was evidence *pro* and *con*. On the final submission of the cause on the pleadings and proof, the court rendered a decree granting the relief prayed for, but as against respondent Maria Finley, limited the operation of the decree to such interest as she had or had acquired as heir at law of said Rebecca H. Finley, deceased. On this point, the following is the language of the decree, to-wit: "Upon consideration, it is ordered, adjudged and decreed by the court, that the complainant is entitled to the relief prayed for in its bill, and to have said mortgage foreclosed as against Henry Finley, and whatever right, title or interest in and to said land which the defendant, Maria Finley, has acquired as heir at law of Rebecca Finley, deceased, whatever interest said Maria Finley has in and to said lands independent of said Rebecca H. Finley, is especially excepted from the operation of this decree." The decree then finds the amount due upon the mortgage debt, with interest, and includes therein attorney's fees, and orders a sale of Henry Finley's interest in said land, and of whatever interest Maria Finley has or has acquired as heir at law of Rebecca H. Finley. From this decree the complainant appeals, and assigns as error, 1, the rendition of said decree; 2. That the court erred in declining to pass upon the claim which the defendant Maria Finley asserted to the land embraced in the mortgage; and 3. The court erred in the decree rendered, in that it did not include in the amount ascertained to be due the attorney's fees as stipulated for in said mortgage. By agreement of the parties, the respondent Maria Finley filed a cross assignment of error and assigned as error the rendition of the decree appealed from in

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that it failed to decline jurisdiction and to dismiss the complainant's bill.

E. M. OLIVER, for appellant, cited *Gormley v. Clark*, 134 U. S. 338; *Shipman v. Forniss*, 69 Ala. 556; *Wood v. Machine Co.*, 83 Ala. 424; *Ledbetter v. Vinton*, 108 Ala. 644.

BARNES & DUKE, *contra*.—"The rule is that in suits to foreclose mortgages, one claiming title adverse to and paramount to the mortgage, can not be made a party for the purpose of litigating his adverse title in a court of equity, and where he is so made, the bill will be dismissed as to him.—2 Jones on Mortgages, 1440; Wilt-sie on Mortgage Foreclosure, §§ 118, 119; 8 Am. & Eng. Ency. Law, (1st ed.), 222; 9 Ency. of Pl. & Pr., 353; *Randle v. Boyd*, 73 Ala. 282; *Hambrick v. Russell*, 86 Ala. 199; *Bolling v. Pace*, 99 Ala. 607.

SHARPE, J.—To dispose of the first assignment of error it is enough to point out that the decree provides for a divesture by foreclosure of all the interest in the mortgaged property which by the bill, is shown to reside in Maria Finley. So far as the bill discloses that interest is only such as came by descent to her as an heir of the deceased mortgagor. The title she sets up in her answer as derived from possession adverse to the mortgagors and all others is not assailed by the bill as an obstruction to the foreclosure sought or otherwise.

Decrees can properly be rendered only *secundum allegata*, since jurisdiction is not drawn to subjects-matter except as invoked by averment in pleading appropriate to that end.—*Meadors v. Askew*, 56 Ala. 584; *Floyd v. Ritter*, *Id.* 356; *McKinley v. Irvine*, 13 Ala. 698; Story's Eq. Pl. § 241; 3 Ency. Pl. & Pr. 357.

A want of averment in a bill cannot be supplied by anything that may be contained in the answer.—*Bone v. Lansden*, 85 Ala. 562; *Lockhard v. Lockhard*, 16 Ala. 430; *Jackson v. Ashton*, 11 Pet. (U. S.), 249; Story's Eq. Pl. § 254; 3 Ency. Pl. & Pr. 358. And proof without averment is not available for relief.—*Alexander v. Taylor*, 56 Ala. 60.

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Cases there are wherein the court with jurisdiction acquired for one purpose may, to afford full relief and settle the entire controversy, extend its decrees to matters other than those from which the chief equity springs; thus in *Lyon v. Powell*, 78 Ala. 351, a bill seeking chiefly to have a conveyance absolute in form declared a mortgage and foreclosed as such, was sanctioned in an attack made by it on an alleged purchase at tax sale had subsequent to the conveyance; and a like decision is found in *Randle v. Boyd*, 73 Ala. 282. But even auxiliary relief cannot go beyond the purview of the bill, which in general includes only the matters averred and such as are incidentally involved in their proper adjustment.

We do not intimate that a claim of title independent of that of the mortgagor, though set up by one who must as an heir be made a party, can properly be brought under adjudication by a bill for foreclosure framed differently from this bill. The propriety of such a bill is not here in question or passed upon.

In support of the cross-assignment of error it is urged only that because of Maria Finley's assertion of title by adverse possession and the evidence relating to it the bill should have been dismissed at least as to her.

If Maria Finley neither had nor claimed any interest in the mortgaged property except by title paramount to that of the mortgagor then no decree could properly have been rendered against her, for in general it is true as laid down in *Bolling v. Pace*, 99 Ala. 607, that the purpose of a foreclosure suit is not to determine in whom title resides, but "to settle interests claimed or existing in subordination to the mortgage." But notwithstanding her assertion of title paramount, the mortgagee and purchaser under the mortgage could not have disputed the title of the mortgagors, and therefore would have been bound to recognize in her as an heir of the mortgagor an equity of redemption. A foreclosure of that interest was proper because necessary to the enforcement of the mortgage.

For testing the claim of title by adverse possession a court of law is the appropriate forum. That claim and the evidence relating to it were improperly obtruded

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into the case and the court had the right *sua sponte* to decline an adjudication of it.

There is nothing to support complainant's third assignment of error since the sum ascertained by the decree as due on the mortgage includes attorney's fees according to its stipulations besides what is due on the principal debt with interest.

The decree will be affirmed on the appeal of the complainant and also on the appeal of the respondents.

DOWDELL, J., not sitting.

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Action by Employee against Employer to recover Damages for Personal Injuries.

1. *Master and servant; liability of master for personal injuries to servant.*—In an action by an employe against his employer to recover damages for personal injuries sustained while in the employ of the defendant, it was shown that the defendant was engaged in clearing the right of way for a railroad and grading and building said railroad. The plaintiff, who was a deaf mute, was engaged with a number of other employes of defendant in such work, and had been so engaged for several days when the accident happened. While deaf, the plaintiff's sight was unimpaired. Among other work that was being done, trees were being felled along the right of way. While the plaintiff was engaged in shovelling dirt on the side of the railroad bridge, and his back was towards some of the other employes who were cutting down a tree, the tree fell on the plaintiff and inflicted the injuries complained of. A fellow servant of the plaintiff, who was at work with him at the time of the injury, under the direction of the defendant's superintendent, attempted to save the plaintiff from the falling tree by pushing him, but was unable to do so. *Held:* There was no duty shown on the part of the defendant to the plaintiff which was violated, and no negligence shown for which the defendant was responsible; and, therefore, the defendant was entitled to the general affirmative charge.

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APPEAL from the Circuit Court of Chilton.

Tried before the Hon. N. D. DENSON.

This was an action brought by the appellant, Peter B. Melton, against the appellee, E. E. Jackson Lumber Company, to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant. The facts of the case are sufficiently stated in the opinion.

The appeal is prosecuted from a judgment in favor of the defendant.

ELLISON & THOMPSON, and CRAIG & CRAIG, for appellant.—The court erred in giving the general affirmative charge for the defendant.—*Belisle v. Clark*, 49 Ala. 98; 3 Brick. Dig., 110, § 52.

PETTUS, JEFFRIES & PARTRIDGE, *contra*.—The plaintiff was not entitled to recovery, and, therefore, the court did not err in giving the general affirmative charge in favor of the defendant.—*L. & N. R. R. Co. v. Banks*, 104 Ala. 508; *Boland v. L. & N. R. R. Co.*, 106 Ala. 641; *Wilson v. L. & N. R. R. Co.*, 85 Ala. 274; *A. G. S. R. R. Co. v. Dobbs*, 101 Ala. 220; *Western R. v. Walker*, 113 Ala. 267; *L. & N. R. R. Co. v. Hall*, 87 Ala. 720; *Minty v. Un. Pac. R. Co.*, 2 Wis. 437, 4 L. R. A. 409.

McCLELLAN, C. J.—This suit is prosecuted by Melton against the Lumber Co. Plaintiff seeks to recover damages for personal injuries alleged to have been sustained by him through the negligence of the defendant, or of an employe of defendant for whose negligence defendant is supposed to be responsible. The complaint in its forepart alleges that the injuries were “caused by the reason of the negligence of persons in the service or employment of the defendant to whose orders or directions the plaintiff as employe at the time of the injury was bound to conform and did conform, and such injuries resulted from his having so conformed to said orders and directions;” but in its after part the complaint sets up that plaintiff’s injuries were sustained in consequence of the failure of one Jones, another employe of defendant, a person to whose orders plaintiff was bound to

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conform, and under whose immediate charge plaintiff was, and whose duty it was to guard and protect and warn plaintiff, who was a deaf mute, against danger, etc. to notify the plaintiff of the danger of a falling tree which other employes negligently felled without using precautions to avoid injuring the plaintiff, and in consequence said tree fell upon plaintiff and injured him. It is apparent that this complaint is inartificially drawn, but it was not subject to demurrer, and we will not consider whether it sets forth any cause of action, since, assuming that it does, the judgment below for the defendant must be affirmed on the ground that defendant was entitled to the general charge which was given; there being no evidence of any negligence for which defendant is responsible.

The plaintiff with thirty or forty other laborers was in the employment of defendant and engaged under Jones as foreman or superintendent in clearing the trees, etc. from a railway right of way and constructing a road-bed thereon. He was deaf, but his sight was unimpaired. He of course knew, for he had been there several days while that work was going on, that trees were being felled all the time where he was working. Jones was under no duty to tell him that this was being done: He knew it as well as Jones did. The danger incident to the felling of trees is of course perfectly obvious, and Jones was under no duty to warn him as to it: He could see and appreciate that as well as Jones could. The fact that he was deaf did not impose any duty upon Jones to warn him of dangers whose presence addressed itself to his unimpaired sense of sight, but rather emphasized his own duty of greater vigilance in the use of that sense. But, as matter of fact, Jones did take cognizance of his infirmity of hearing and out of abundance of caution put him to work with Seals, an acquaintance and friend of the plaintiff, and who would converse with him by the use of the finger-alphabet, while Jones could not, and charged Seals not to let him get hurt in any way. Seals was working with him at the time of the injury, and he did all that was possible to save him from the falling tree by pushing him both to call his attention to the dan-

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ger and to put him beyond its path. At the moment plaintiff's back was to Seals and the communication could only be made in the way adopted. There was some evidence tending to show that plaintiff's fellow servants who were felling the tree did not give warning that it was falling as soon as they should have, but if they were negligent in this regard it was not negligence for which defendant is responsible to the plaintiff. There was, we conclude, no evidence before the jury that Jones was negligent either in respect of orders given the plaintiff or in respect of warning him of the danger from which the injuries complained of resulted. The trial court was fully warranted in giving the affirmative charge for the defendant.

Affirmed.

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Action of Assumpsit.

1. *Sale of articles of merchandise; implied warranty; duty of purchaser upon discovering defects.*—Where articles of merchandise are sold by description and for the purpose of resale by the purchaser, there is an implied warranty that the articles sold shall not only answer the description, but that they shall be merchantable; and if upon their delivery such articles are in bad condition, and are to a great extent unmerchantable, the purchaser, upon a discovery of such condition, has the right either to rescind the sale within a reasonable time and return the articles, or retain them and avail himself of the damage suffered either by bringing his cross action for the breach of the warranty, or by proving their real value and abating the purchase price *pro tanto*.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This was an action of assumpsit, brought by the appellants, Frith & Co., against the appellee, G. W. Hollan, to recover the balance due upon the purchase price

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of onions, which had been sold by the plaintiffs to the defendant.

On the trial of the cause, the evidence for the plaintiffs tended to show that the defendant had bought twenty-five barrels of onion sets from the plaintiffs; that he paid for them except a balance for which the suit was brought. The evidence for the defendant tended to show that when the onion sets were received by the defendant they were badly sprouted and much damaged, and that they were not worth more than half the price the defendant agreed to pay for them, and that they were damaged in at least the amount claimed by the plaintiffs in the present suit.

It was further shown that the price agreed to be paid for the onions was \$144; that the defendants had paid \$104, leaving \$40 due, which was the amount sued for. It was further shown by the evidence that upon receipt of the onion sets, the defendant proceeded to put them in his store for sale, and to fill orders which had been previously left with him for future delivery.

Upon the introduction of all the evidence, the plaintiff requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "If the jury believe the evidence they will find for the plaintiffs." (2.) "An implied warranty is not a guarantee that the article or thing sold is the best of its kind, or such as might have been represented at the time of sale, only that such article shall be reasonably suitable for the purpose for which it was intended to be used, and if the testimony shows that the defendant used said sets, they will find for the plaintiffs." (3.) "If the evidence shows that the onion sets delivered to defendant did not come up to warranty expressed or implied, the defendant must rescind by an offer to return the article in a reasonable time after discovery of the defects, and if he failed to rescind, you will find for the plaintiffs." (4.) "The defendant must act with promptness when he discovers that the property was not such as was contemplated and offer to return it. If he neglects to do so immediately upon discovering

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a breach of warranty or fraud and keeps it and treats it as his own, as by offering to sell it, he can not reject the contract and is liable." (5.) "If the evidence shows that the defendant accepted the goods by using them as his own by selling them, it is immaterial whether any of the goods were returned by the persons to whom Hollan had sold them, or whether he sold them at a reduced price or lost half."

There were verdict and judgment for the defendant. The plaintiffs appeal and assign as error the refusal of the court to give the several charges requested by them.

WORTHY & GARDNER, for appellant, cited *Hodge v. Tufts*, 115 Ala. 366; *Gachet v. Warren*, 72 Ala. 288; *Pacific G. Co. v. Mullens*, 66 Ala. 582; Benjamin on Sales, §§ 157, 656; 15 Amer. & Eng. Ency. of Law, 1220, 21, 22; *Burnett v. Stanton*, 2 Ala. 195; *Perry v. Johnson*, 59 Ala. 646; *Armstrong v. Bufford*, 51 Ala. 410; Mechem on Sales, § 1380.

FOSTER, SAMFORD & CARROLL, *contra*.—When goods are sold by description, and the buyer has not an opportunity of examining them, it is of the essence of the contract that the goods delivered shall answer to the description and there is also an implied warranty that the article furnished shall be merchantable.—*Gachet v. Warren*, 70 Ala. 288; 15 Amer. & Eng. Ency. of Law, 1229.

The vendee may waive his right to proceed on the warranty, where the purchase price has not been paid, and may set up breach of it in defense to an action by the vendor to recover the price. The damage resulting from the breach of warranty may go in reduction of the amount to be recovered by the vendor to the extent to which the article has been diminished in value by non-compliance with the warranty.—28 Amer. & Eng. Ency. of Law, 825, 810; 819, 820; Benjamin on Sales, § 901; *Davis v. Dickey*, 23 Ala. 848; *Hodge v. Tufts*, 115 Ala. 366.

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TYSON, J.—This action was brought to recover the balance claimed to be due on the purchase price of onion sets sold by plaintiffs to defendant. The sale of the sets was at Troy, Ala., to the defendant as a merchant and by description. When delivered they were in bad condition, much of them being unmerchantable. In such case there is an implied warranty, that the sets delivered shall not only answer the description, but that they shall be salable or merchantable.—*Gachet v. Warren*, 72 Ala. 292; 15 Am. & Eng. Ency. Law, (2d ed.), 1229. The defendant upon discovery of the condition of the sets had the right to rescind the sale within a reasonable time and return them; or retain them and avail himself of the damage he had suffered either by bringing his cross action for the breach of warranty, or to prove their real value and abate the recovery *pro tanto*.—*Brown v. Freeman*, 79 Ala. 410; *Eagan v. Johnson*, 82 Ala. 233; *Young v. Arntze Bros.*, 86 Ala. 116; 15 Am. & Eng. Ency. Law (2d ed.), 1255; Benj. on Sales (7th ed. Bennett's), p. 965.

There is no evidence in the record tending in the remotest degree to support the theory that the sale counted on was by inspection and not by description. Under the evidence, it was a question for the jury to determine whether the price agreed to be paid by the defendant should be abated to the extent of the balance claimed by plaintiff against him.

It follows that the affirmative charge was properly refused to the plaintiffs. The other charges requested by them were at variance with the principles we have declared and were correctly refused.

Affirmed.

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Proceeding by City Council to collect Paving Tax.

1. *Municipal corporation; construction of charter as to power of paving.*—The section of a city charter which provides “that it shall be lawful for said city council from time to time and in such manner as it may determine, to pave, gravel, or macadamize any street, avenue, square, public place or alley in whole or in part within the corporate limits or said city, whenever said city council may deem it necessary or expedient to do so; and for that purpose said city council is hereby authorized and empowered to adopt and provide the means therefor,” is sufficiently comprehensive to include and authorize side-walk paving; the term “street” in such connection applying to the whole thoroughfare, including the sidewalk.
2. *Same; assessment for street paving must be in proportion to benefit to abutting property.*—No municipal corporation can, under the constitution, make any assessment for the costs of sidewalk or street paving, or for the costs of the construction of any sewers or the placing of curbing on a sidewalk, against the property abutting on such street or sidewalk so paved or drained, in excess of the increased value of such property, by reason of the special benefits derived from such improvements; and an assessment of the costs of paving levied against the adjacent property without reference to the extent of the benefit to the property, is invalid, will be vacated, and the costs of paving so assessed can not be collected. (McCLELLAN, C. J., dissenting.)
3. *Taxation; assessment necessary to collect taxes.*—An assessment is the first step and an indispensable incident in proceedings to collect taxes; and being the foundation of all subsequent proceedings, no taxes can be collected without a valid assessment.

APPEAL from the City Court of Montgomery, in Equity.

Heard before the Hon. A. D. SAYRE.

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This was a proceeding instituted by the City Council of Montgomery against the appellee, T. Gardner Foster and certain lots situated on the east side of Perry street in the city of Montgomery, seeking to charge said lots with a lien in favor of the city of Montgomery for the costs of paving the street in front of said lot and the paving of the sidewalk and the curbing of the sidewalk. The pavement, the payment of which is sought to be enforced, was done by the city council of Montgomery and the part of the assessment for said pavement was assessed against the lot, and upon default being made in the payment by T. Gardner Foster, trustee, the assessment was filed in the city court of Montgomery on the equity side of the docket in accordance with the special act of the legislature controlling such matters. (Acts of 1886-87, p. 776). The assessment as shown in the list of property filed in the city court of Montgomery, so far as the present proceeding is concerned, is as follows: "Assessment for sidewalk and street paving, \$300.74."

The defendant filed an answer, in which he set up the defense that the ordinance under which the paving tax was imposed, and is now sought to be collected, was unconstitutional and void, as being violative of the Constitution of the State of Alabama, and also the XIV amendment of the Constitution of the United States.

There was attached to this answer copies of the ordinance under which the paving tax was levied. The ordinance for the paving of South Perry street was in words and figures as follows: "An ordinance to gravel South Perry street from the north side of Washington street to the north side of what is known as Jeff Davis avenue in the city of Montgomery. Section 1. Be it ordained by the city council of Montgomery as follows: That South Perry street from the north side of Washington street to the north side of what is known as Jeff Davis avenue shall be graveled with ten inches of gravel. Said work is to be done under the control and direction of mayor and city engineer, and in such manner as to make a good and substantial pavement. Sec-

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tion 2. Be it further ordained: That upon the paving and improving of said street, as herein provided, it shall be the duty of the city engineer to prepare and file with the city clerk a statement showing the number of feet frontage of each lot on each side of said street, together with the name of the owner or owners of each of said lots, and where any of said lots front on more than one street, showing the number of feet frontage on each street, which statement shall be so prepared and filed within thirty days after the completion of the work on said street. Section 3. Be it further ordained that the city engineer shall also make a statement of the total cost of the paving or improving of said streets, and shall apportion against the owners of said lots fronting on said streets to be apportioned against said lots in proportion to the number of feet frontage of each lot on such street; provided, that not more than one-fourth of the cost of such improvement in favor of the property taxed, nor more than ten dollars per front foot shall be apportioned to any one lot; and that corner property to which an apportionment has been made on any one front, shall be apportioned for the improvement of the street on the other front, not exceeding one-eighth of the cost of the improvement of the other front, and not exceeding two dollars and fifty cents per front foot. Section 4. Be it further ordained, that it shall be the duty of the clerk on receiving such statement from the city engineer, to assess against the owner or owners of said several lots the cost so apportioned by the city engineer, in the statement of such improvement in front of said several lots, and collect such assessments at the same time and in the same manner as city taxes are collected. Section 5. Be it further ordained, that the assessments required to be made by the clerk as aforesaid shall be entered by him on the city tax assessment books against the owner or owners of said several lots, and against said lots as assessments for taxes are entered in such books, and the same shall be a lien on said lots in favor of the city for the amount of such assessments, and such assessments when so entered on said books, shall, together with the said statement of the city engineer, be delivered by the clerk to the mayor of the city, pursuant

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to the law regulating the assessment of taxes against property in the city of Montgomery, to the end that such property owners may have an opportunity to file objections to such assessments and be heard thereon should they so desire. The said assessments hereby authorized to be made, being subject in all respects to the charter and code of the city of Montgomery in reference to assessments on property for taxation. Section 6. Be it further ordained: That the city treasurer be and he is hereby instructed to advertise for bids for paving South Perry street, in accordance with the provisions of this ordinance. Section 7. Be it further ordained, that this ordinance shall not repeal any section of the city code, nor any special ordinances heretofore adopted and approved for the purpose of paving or otherwise improving any street, alley or other public place in the city of Montgomery, but where this ordinance requires other things to be done, not required by said special ordinances such special ordinances shall be amended in that respect."

The ordinance relating to the sidewalk paving, after providing for the territory within the city of Montgomery where the sidewalks were to be paved and that the grade was to be established by the city engineer, then provided as follows as to the payment of said sidewalk paving: "That it shall be the duty of the city engineer to serve written notice upon the owner, agent, or occupant of the premises required to be paved herein, to pave said sidewalk, and in case said owner, agent, or occupant refuses or fails to do so for ten days after service of said notice, said pavement shall be laid by and under the supervision of the city engineer, and the cost thereof shall be certified by the city engineer to the city clerk, who shall tax said costs against said property, which shall be a lien upon said property and collected the same as other city taxes are collected."

The ordinance providing for the placing of curbing on the streets contained the following proposition as to the payment of costs thereof: "Should the owner or owners of such lots or any of them fail for ten days from the time of service of said notice to set said curbing, the

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mayor is hereby authorized to direct and have said curbing set at the expense of the owner or owners or holders of said lots, or any of them, the cost of which shall be assessed against the said owner or owners or holders of the said adjacent lot or lots, and assessed and collected in the same manner as taxes are now assessed and collected by the city council." The other facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

On the hearing of the cause the court held that inasmuch as the assessment was an arbitrary one per front foot, and not based upon any special benefit accruing to the property from said paving, that said assessment was null and void and was violative of the constitution and should be vacated, and ordered that said assessment against the defendant's property be set aside and annulled and vacated, and the proceedings dismissed. From this decree the city council of Montgomery appealed, and assigned the rendition thereof as error.

GRAHAM & STEINER, for appellant.—The assessment in this case should not have been declared void and been vacated.

If an irregularity, the charter provides that the lien of the city shall not be affected for that reason; and the proceeding instituted in this case was on the equity side of the city court, in order and for the purpose of enforcing the lien of the city, and in defense of that suit the appellee could set up anything tending to reduce the amount of the assessment, or to show that it, or any portion thereof, was erroneous. This the appellee did not attempt to do, as will be shown by his answer on file.

The court, in the case of the *City Council v. Birdsong*, construed the act of 1876-77, page 776, under which these suits were instituted in the city court, in which act is found the expression, "Unless for good cause shown," holding that, in defence of these suits, the property owner was not estopped to show that the amount claimed was erroneous for any reason. This being true, the statute gave the defendant the opportunity to show cause why any portion of the assessment was invalid.

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The court below did not consider the right of the city to recover for anything whatsoever, on any other question than the Fourteenth Amendment to the Constitution of the United States, holding that the assessment was absolutely null and void, because it was an attempt to take property without due process of law.

Defendant's contention—and practically the sole contention—is based upon the theory, that inasmuch as the ordinance providing for the paving assesses the cost against the property per front foot and says nothing of benefit, that therefore it is arbitrary and is an assessment made without regard to benefit; hence void. It is unnecessary for the taxing power, even though it should be limited to assessments based upon benefit, when they make an assessment to add: "P. S. The above assessment is based upon special benefits that the property receives."

See *Brown v. Barbour Asphalt Paving Co.*, recently decided by the Supreme Court of the United States; *King v. Portland*, 62 Pac. Rep. 2; *Cass Farm Co. v. Detroit*, 83 N. W. Rep. 108; *Sheley v. City of Detroit*, 45 Mich. 431; *Parsons v. District of Columbia*, 170 U. S. 45; *Spencer v. Merchant*, 122 U. S. 345; *Webster v. City of Fargo*, 82 N. W. Rep. 732; *State v. District Court*, 83 N. W. 183; 7 L. R. A. 121; *Heman v. Allen* (Mo. Sup.) 57 S. W. 559; and *Paving Co. v. French* (Mo. Sup.), 58 S. W. 934; *Conde v. City of Schenectady*, 58 N. E. 130; *Hadley v. Dague*, 62 Pac. 500.

GORDON MACDONALD, LOMAX, CRUM & WEIL, MARKS & SAYRE, W. T. SEIBELS, and JOHN D. MCNEEL, *contra*.—If the assessment is wrong in principle, or based upon an erroneous application of the law, it can not be upheld; and an unauthorized rule of valuation, or fraud in the assessment invalidates the tax and all proceedings thereunder.—25 Amer. & Eng. Ency. of Law, 237, 238.

The assessment in this case was no tin proportion to the benefit accruing to the abutting property from the improvements, and such assessment was, therefore, not according to the constitution; and the costs of paving can not, therefore, be collected. The assessment being void

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as a whole, it would not support a charge for what might be illegally due.—*Norwood v. Baker*, 172 U. S. 269; *Hutchison v. Storrie*, 52 S. W. Rep.; *Parsons v. District of Columbia*, 170 U. S. 45; *Trenton v. Raff*, 36 N. J. L. 343.

By the XIV amendment to the Constitution of the United States, the states are forbidden to deny to any person within their jurisdiction the equal protection of the laws. This provision is a limitation on the taxing power of the State and every State agency, and it requires uniformity in the enactment and in the administration of State tax laws.—*The Railroad Tax Cases*, 13 Fed. Rep. 722; *Nashville, etc. R. Co. v. Taylor*, 86 Fed. Rep. 169. The guarantee of "due process of law," in the XIV amendment, forbids the taking of private property for public use, by eminent domain, or by taxation, without just compensation.—*C. B. & Q. R. R. v. Chicago*, 166 U. S. 239; *Staton v. R. R. Co.*, 111 N. C. 282; *Porham v. Justices*, 3 Cal. 841; *Harness v. Chesapeake Canal Co.*, 1 Md. Ch. 248. In *Cole v. LaGrange*, 113 U. S. 8, the court says: "So far as respects the use the taking of private property for taxation is subject to the same limit as taking by the right of eminent domain. Each is a taking by the State for public use." See also *Fallbrook, etc. District v. Bradley*, 164 U. S. 160; *Bradshaw v. Omaha*, 1 Neb. 38; *City v. Larned*, 34 Ill. 203; *Millett v. People*, 117 Ill. 295; *Davis v. Crutchfield*, 145 Ill. 313; *Seers v. Street Commissions*, 173 Mass. 352, and the numerous authorities cited in *Norwood v. Baker, supra*.

Benefit to the property abutting upon the streets improved is the only lawful basis for the assessment to be levied.—*Guest v. Brooklyn*, 69 N. Y. 506; *Hamnett v. Philadelphia*, 65 Pa. 146; *Lee v. Ruggles*, 62 Ill. 427; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518; *Re Drainage of Lands*, 35 N. J. L. 497; *Thomas v. Gain*, 35 Mich. 135; *Hutcheson v. Storie*, 92 Texas, 688; *Norfolk v. Young*, 97 Va. 728; *Allegheny City v. W. P. R. R. Co.*, 138 Pa. 375. Any such assessment which preclude, or which may authorize the preclusion of an ascertainment of benefits as a necessary basis, are violative of constitutional provisions forbidding private property to be taken for public use

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without *just compensation* first made, and those which require "due process of law."—*Sears v. Boston Street Commissioners*, 173 Mass. 247; *Dexter v. Boston*, 176 Mass. 247; *Adams v. Shelbyville*, 154 Ind. 467; *McKee v. Pendleton*, 154 Ind. 652; *Stewart v. Palmer*, 74 N. Y. 183; *St. Louis, for use, etc. v. Clemens*, 52 Mo. 133.

SHARPE, J.—Authority in the city council of Montgomery to make a special assessment against property to defray expenses of sidewalk and street paving is found alone in sections 12 and 34 of the act "To establish a new charter for the city of Montgomery," approved February 10, 1893.—Acts, 1892-93, p. 428. In the first part of section 12 is a provision relative to keeping sidewalks clean and in repair at the expense of property owners and for subjecting property to such expense. but that clause of the statute is not to be here considered since no item for such cleaning or repairing is involved in this case. The next clause purports to confer power "to require pavements to be laid, and prescribe the kind of pavements to be laid, and to compel the laying of the kind of pavements prescribed in the streets, sidewalks, alleys, and public places of said city, at the expense of the property owner except as herein provided." The subject is next pursued in section 34, as follows:

"Be it further enacted, That it shall be lawful for said city council from time to time, and in such manner as it may be determined to pave, gravel or macadamize any street, avenue, square, public place or alley, in whole or in part, within the corporate limits of said city, whenever said city council may deem it necessary or expedient to do so, and for that purpose said city council is hereby authorized and empowered to adopt and provide the means therefor, and to pass all such by-laws and ordinances as may be required for assessing the property to be benefited thereby for such amounts as may be fair and reasonable, not to exceed one-half of the construction thereof, and of the expense of laying down the same, and also to collect and enforce such assessments as in the case of city taxation, such assessments to be made on property on both sides of the street, or parts of the

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streets thus improved per front foot, the assessment not to exceed in any case more than one-fourth of the cost of improvement in front of the property, nor more than ten dollars per front foot of the property taxed, provided, that corner property which has been assessed for the improvement of the street on one front shall not be assessed for the improvement of the street on the other front, exceeding one-eighth of the cost of the improvement on such front, nor exceeding two dollars and one-half per front foot, but in case of corner property the assessment shall include all of the street in front of the sidewalk on the narrowest front of said property."

In *City Council of Montgomery v. Birdsong*, 126 Ala. 632, it was held that sidewalk paving though not specifically mentioned in section 34 as a subject of the powers and limitations there expressed, was included therein by what is said as to street paving. The correctness of that decision has been questioned, but the construction there given the charter is adhered to. By authoritative definition as well as common usage, the term street applies to the whole public thoroughfare including sidewalks, the latter constituting parts of the street reserved to pedestrians.—Bouv. Dict. Tit. Sidewalk; *Burmeister's case*, 76 N. Y. 174; *City v. Mahan*, 100 Ind. 242. The term, however, may be employed to designate the way between sidewalks, and how it should be understood in a given case, may depend on the connection in which it is used. If section 12 bounded the city's power in respect of sidewalk paving, it is at least questionable whether it could by any rule assess property to pay for such paving since in general such power is not implied and can only arise from express legislative grant.—Burrows on Taxation, § 126; Endlich Int. of Stat. § 352. The fact that express provisions for levying and collecting paving assessments are made in section 34, indicates that section 12 was not intended to supply assessing powers, and no good reason is apparent why sidewalk paving should be excluded from those express provisions and left to be compelled by penalties or by doubtfully implied powers of taxation. The direction in section 34 for assessing property on both sides of the street for not

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more than one-fourth of the cost of improvements in front of the property may be applied when the improvement is of the whole street including sidewalks, as well as when the improvement is of the space between sidewalks; the legislative intention being to limit the charge on property to one-half the whole cost, and one-fourth the cost of the entire width being equal to one-half the cost to the center line of the street. Sidewalks are mentioned separately in the act in recognition of the necessity which may exist for improving them alone and to confer power for that purpose. Besides being limited to half such expense, the power to assess is further and materially qualified by the excepting clause of section 12 in connection with that part of section 34 which restricts assessments to property benefitted, and to such amounts as may be fair and reasonable. In *Birdsong's case, supra*, these provisions were construed to authorize the making of such assessments only on a basis of benefits to the property. That construction now prevailing operates to divest this case of the constitutional question discussed in briefs as to whether the legislature had power to authorize unqualifiedly the imposition on property of the whole or of a given proportion of the cost of such improvements. Here the legislature has not attempted to exercise such power.

As appears from the statement filed in the city court the assessment here in question is for "sidewalk and street paving." So much of it as comes from sidewalk paving is based on an ordinance which deviates from the city's charter in that it directs the whole cost of paving an adjoining property without reference to the extent of benefit to the property. The ordinance relied on as authorizing street graveling charged for likewise ignores the question of benefit, and in that particular is obnoxious to the charter.

Municipal corporations derive their powers from the State and cannot legislate in excess of them.—*Birmingham, etc. Co. v. Birmingham, etc. St. R'y. Co.*, 89 Ala. 465; *Dillon Mun. Corp.* §§ 317, 319, 329. This principle is applied strictly to ordinances proposing to assess taxes on property for local improvements.—*Cooley on*

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Taxation, 678; Dillon Mun. Corp. § 357. We concur with the city court in holding that the assessment made under those ordinances is void. As further expressing reasons for that conclusion we adopt the following from the opinion of the trial judge expressed concerning the street graveling ordinance, the principle stated being applicable to the sidewalks ordinance as well: "It requires the city engineer to prepare and file with the city clerk a statement showing the number of feet frontage of each lot on each side of the street. He is also required to make a statement of the total costs of the improvement of the street, and to 'apportion against the owners of said lots one-half of the costs of the city of such improvement on said street, to be apportioned against said lots in proportion to the number of feet frontage of each lot on such street; *provided*, that not more than one-fourth of the costs of such improvement in front of the property, to be taxed, nor more than ten dollars per front foot shall be apportioned to any one lot.' It then provides that the city clerk, on receiving such statement from the city engineer, 'shall assess the amount of such improvement in front of said several lots, and collect such assessments at the same time and in the same manner as city taxes are collected.' The ordinance then gives the property owner an opportunity to file objections to the assessment with the city council, and he is also afforded another such opportunity in this court. In this ordinance there is not a syllable which by any sort of construction can be construed into a recognition of the fact that an assessment by the front foot, even within the limits provided, may not be fair and reasonable. There is not an intimation that the city engineer and city clerk in making the assessment shall consider benefit conferred. The ordinance could not have been framed in terms which would more certainly and effectively deny to these officers the right to consider whether the amount of the assessment was greater than the amount of benefit conferred by the improvement. They are required to proceed according to a fixed plan, and not otherwise. The charter has been held by the Supreme Court to mean that the assessment is to be made 'fair and reasonable,' notwithstanding the requirements that it

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be made by the front foot. But this cannot be held to be the meaning of the ordinance. The ordinance means nothing more nor less than that one-half of the costs of improving the entire street is to be distributed among all the lots fronting upon the street in proportion to their frontage. This is a mere matter of arithmetic. The rule is fixed beyond preadventure and is arbitrary in the most absolute sense. * * * The foundation of the entire proceeding being a mere nullity, nothing could be built upon it. The property owner could not be put in default by subsequent proceedings. He was not called to make objections before the city council or in this court. * * * 'There must be an assessment either made pursuant to the levy, or adopted as the basis of the levy, else there can be no lawful collection of taxes.' In Hilliard on Taxation, 291, it is said: 'Assessment is so far an indispensable incident to taxation, that no right of action arises until a legal assessment is made. * * * Even a payment of money as taxes on property before the assessment, and the collector's receipt therefor, are no legal discharge of taxes subsequently assessed thereon.' So in Cooley on Taxation, 259, it is said, citing many authorities, that 'of the necessity of an assessment, no question can be made. Taxes by valuation cannot be apportioned without it. Moreover it is the first step in the proceedings against individual subjects of taxation and is the foundation of all which follow it. Without assessment they can have no support and are nullities.'—*Perry County v. Railroad Co.*, 58 Ala. 560."

Judgment affirmed.

MCCLELLAN, C. J., *dissenting*.

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Bill in Equity for Settlement of a Partnership.

1. *Bill for settlement of partnership when complainant not entitled to relief.*—Where a co-partnership was formed between individuals and a partnership, and after the dissolution of the co-partnership the partnership member of said firm files a bill seeking to have an accounting and settlement of said partnership, averring that although there had been a dissolution there had never been a settlement of the partnership affairs, and the individual member of said partnership in his answer admits the dissolution and denies that there had not been a settlement, and sets out facts going to show such settlement, and the evidence shows that after the dissolution there was a settlement of the partnership affairs between the individual member thereof and one of the firm constituting the other member, and that this member of the firm had the active management and control of said firm's business, and that the firm member of the partnership accepted the results of this settlement, the evidence in such case is insufficient to sustain the averments of the bill, but shows that the settlement of the partnership affairs had been had after its dissolution, and that, therefore, the complainant was not entitled to the relief prayed for.
2. *Appeals; how decree of chancery court considered.*—On an appeal from a decree rendered in a chancery suit, the Supreme Court must not, under the provisions of the statute, (Code, § 3826, subd. 1), indulge any presumption in favor of the chancellor's finding on the facts, but it is the duty of the Supreme Court to weigh the evidence and give judgment as they deem just.

APPEAL from the Chancery Court of Crenshaw.

Heard before the HON. WILLIAM L. PARKS.

The bill in this case was filed by the appellees against the appellant, T. W. Shows. The purpose of the bill and the facts of the case are sufficiently stated in the opinion.

Upon the final submission of the cause on the pleadings and proof, the chancellor decreed that the com-

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plainants were entitled to the relief prayer for, and ordered accordingly. From this decree the defendant appeals, and assigns the rendition thereof as error.

J. M. CHILTON, D. M. POWELL and M. W. RUSHTON, for appellants.—If there was a settlement of the partnership shown by the evidence, the complainant was not entitled to the relief, and the decree of the chancellor should be reversed; and this is true, whether the settlement was final, including all the partnership transactions or not. If there was a settlement at all, it was shown by the evidence to have been made after the dissolution, and under the averments of the bill the complainant was not entitled to relief.—2 Bates on Partnership, § 957; *Parkhurst v. Muir*, 7 N. J. Eq. 555; *Desha v. Smith*, 20 Ala. 747; 2 Lindley on Partnership, § 513; *Foster v. Ryan*, 17 Gratt. 322; *Heuven v. Wetteen*, 31 Beav. 315; *Milford v. Milford*, McLe. & Y. 150.

FOSTER, SAMFORD & CARROLL, *contra*.—On the facts of this case, as shown by the evidence, the complainant was entitled to the relief prayed for. The testimony as shown by the affidavit of R. H. Folmar, which was introduced in evidence, was not sufficient to show that no settlement had been made.—17 Am. & Eng. Ency. of Law, 926; *Jeffrey v. Castleman*, 75 Ala. 64.

Every presumption should be indulged in favor of the finding of the chancellor on the facts in a case because of his proximity to the parties interested, and of his familiarity with the character of the party testifying and of the testimony. And unless the preponderance of the testimony is against the finding of the chancellor this court should not disturb his ruling and his decrees in the case.

DOWDELL, J.—The bill in this case is filed by James Folmar Sons & Co., a partnership, and Folmar Bros., another partnership, which is alleged to have succeeded to the rights of the former, and claiming the benefits of whatever decree, James Folmar Sons & Co. may be entitled to under the allegations of the bill. The pur-

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pose of the bill is to have an account and settlement of the partnership of T. W. Shows & Co., which said firm, it is averred, was composed to James Folmar Sons & Co. owning one-half interest, and T. W. Shows, who is made defendant in the bill, owning the other half interest, in said partnership of T. W. Shows & Co. The bill alleges that the partnership of T. W. Shows & Co. was formed on the 16th day of October, 1893, and the object of its formation was to conduct and carry on a livery and sale stable business in the town of Luverne, Ala. It is averred that James Folmar Sons & Co. contributed to the capital stock of the concern, at the time of its creation, the sum of seven hundred dollars, and that T. W. Shows contributed five hundred and ninety-nine and 50-100 dollars, or one hundred and 50-100 dollars less than the other partner. It is also averred in the bill that Shows managed and controlled the business of the partnership, and that the partnership continued in business until on or about the 14th day of August, 1894, when it was dissolved by mutual consent, but alleges that no settlement of the partnership business was ever had. The bill contains the further, apparently inconsistent allegation and statement, that from the 16th day of October, 1893, to the 8th day of February, 1895, (the latter date covering a period of about six months after the day of the alleged dissolution of the partnership), James Folmar Sons & Co. contributed to the capital stock of the partnership, the additional sum of \$4,372.88, and as to the defendant Shows, it states that "he contributed no money or other thing of value to said partnership except said sum of \$599.50, and from time to time deposited the sum of \$2,298.89 in the bank of James Folmar Sons & Co., known as the Bank of Luverne, on account of his share of the capital stock of said partnership." It is averred that the money so contributed went into said business and became a part of its capital stock. The bill also avers, that Shows had brought suit in the circuit court of Crenshaw county in his own name against James Folmar Sons & Co. and Folmar Bros., but the matters involved in said suit were partnership matters of the firm of T. W. Shows & Co., which said suit is prayed to

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be enjoined. There are other averments as to agreement by James Folmar Sons & Co. to discount certain notes and mortgages when taken by T. W. Shows & Co. in the sale of mules. The prayer of the bill is for a settlement of the partnership, and for an accounting "of all and every of said partnership dealings and transactions." The bill is in no aspect, whether considered in reference to the averments or the prayer for relief, one to falsify and surcharge. It is round in its allegations, that there has never been any settlement of the partnership, and prays for a settlement and an accounting.

The respondent Shows, answering the bill, admits the formation of the partnership of T. W. Shows & Co. on the 16th day of October, 1893, and its dissolution in August, 1894. He denies that James Folmar Sons & Co. contributed any sum in money to the capital stock of the partnership, but avers that they contributed horses, mules and vehicles at an agreed valuation of \$1,400, of which the respondent paid them on the same day \$599.50, and \$100.50 was charged to him on the books of James Folmar Sons & Co. and which was afterwards paid, and that this was all the money or property contributed by either party to the concern. He expressly denies that James Folmar Sons & Co. afterwards contributed said sum of \$1,372.88, or any other sum, or that the respondent afterwards contributed any other sum to the capital stock, other than as stated as to paying one-half of the agreed valuation of the horses, mules and vehicles furnished by James Folmar Sons & Co. The answer shows that the defendant ran an individual account in his own name with James Folmar Sons & Co., and made deposits in the Bank of Luverne, which was run by James Folmar Sons & Co. and for which certificates were issued to him in his individual name, and that his individual account with James Folmar Sons & Co. and with the Bank of Luverne, had no connection whatever with the partnership matters of T. W. Shows & Co. It was also shown by the answer of respondent that there were mutual accounts between the firm of T. W. Shows & Co. and the firm of James

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Folmar Sons & Co. The answer further denies that the partnership matters of the firm of T. W. Shows & Co. are unsettled, and avers, that upon the dissolution, there was a division of the assets of the partnership between himself and James Folmar Sons & Co. and a full settlement of the partnership matters.

The cause was heard for final decree upon the pleadings and proof, and what we have stated above as to the allegations of the bill and the denials in the answer, are sufficient for present purposes.

There are questions suggested and discussed in the brief of appellant's counsel relative to the pleadings, which we deem it unnecessary to consider, as we think the case may be properly determined on the main issue by the proof. The bill alleges the formation and dissolution of the partnership, and then alleges that no settlement of the partnership affairs was ever had. The answer admits the allegations as to the formation and dissolution, but expressly denies the allegation that no settlement of the partnership matters was made.

The evidence without conflict shows that R. H. Folmar, one of the firm of James Folmar Sons & Co., and who is a complainant in the bill, had the active management and control of the business of his said firm, and that he representing the firm of James Folmar Sons & Co. with T. W. Shows effected the partnership of T. W. Shows & Co., and also its dissolution. The evidence further shows, and we might say without dispute, that upon the dissolution of said partnership, a division of its assets was made, in which division T. W. Shows received the horses, mules and vehicles on hand, and the book accounts of the firm, amounting to about \$100, while James Folmar Sons & Co. received the notes and mortgages due the concern, amounting to about \$1,400; that immediately upon the dissolution and division of the assets, T. W. Shows, with the property allotted to him, set up and carried on the livery and stable business in his own name; and James Folmar Sons & Co. proceeded to collect the notes and mortgages so received by them; and that neither party afterwards pretended to claim any interest in the property of the other under said division and allotment, un-

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til T. W. Shows began to press the collection of an individual claim, which he held against the firm of James Folmar Sons & Co. The evidence also shows, that at the time of the dissolution the firm of T. W. Shows & Co. owed only two small debts, one of which was a disputed claim, and that these debts were subsequently settled in accordance with an agreement made between Shows and R. H. Folmar at the time of the dissolution, by James Folmar Sons & Co. paying one, and T. W. Shows and James Folmar Sons & Co. each paying one-half of the disputed claim, after the same had been reduced to judgment against the firm. The evidence also shows that during the existence of the partnership, mutual accounts were run between T. W. Shows & Co. and James Folmar Sons & Co., and it is claimed by the defendant that in the settlement on the dissolution by agreement these accounts were settled by set-off of one against the other. This is disputed by the complainants, but it is a pertinent fact in support of defendant's contention that the difference in the two accounts was small and further, no question as to them was ever raised, until the defendant Shows began to press the collection of his individual demand and claim against the complainants.

Upon the whole evidence, it is quite evident that the theory of the complainants, that there had never been a settlement of the partnership affairs is based largely upon the erroneous supposition that the individual account of T. W. Shows with James Folmar Sons & Co. and with the Bank of Luverne, a branch business of James Folmar Sons & Co., entered into the partnership business of T. W. Shows & Co. The nature and character of this individual account, the items which enter into it, the way in which it was carried on the books of James Folmar Sons & Co. and the Bank of Luverne, undoubtedly, we think, support the testimony of T. W. Shows, that the account had no connection whatever with the partnership matters of T. W. Shows & Co.

R. H. Folmar, who is made a complainant in the bill, and who is conceded to have been the active managing partner in the firm of James Folmar Sons & Co., is not

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examined as a witness in the case, but an affidavit made by him is put in evidence by the respondent as an admission against interest. In this affidavit it is admitted, that there was a full and complete settlement of all the partnership matters of T. W. Shows & Co. upon its dissolution. This admission is conclusive against him, as a complainant, to any relief under the bill. It is of no consequence that the other partners of the firm of James Folmar Sons & Co. were not present, at the time of the settlement and division of the assets of the firm of Shows & Co. by T. W. Shows and R. H. Folmar, the managing partner in the business of Folmar Sons & Co., since the fact remains that this firm accepted the assets allotted to it in the division and has continued to hold and enjoy the fruits of the settlement. If a ratification of the conduct of R. H. Folmar in making the settlement and division were necessary, this is sufficient from which to infer a ratification. But the purpose of the bill is not to falsify and surcharge. It is not pretended that the settlement was fraudulent or unfair, but that in fact, there never was a settlement. Without discussing the testimony of the witnesses in detail, but giving to each full and fair consideration, when taken in connection with their opportunities of knowing the facts, and also in connection with attendant circumstances and facts that are undisputed, we are firmly persuaded, that a settlement of the partnership affairs of T. W. Shows & Co. was had at the time of its dissolution between T. W. Shows representing himself, and R. H. Folmar, a member of the firm of James Folmar Sons & Co. representing the latter firm, which the bill alleges constituted one of the members, or partners, of the firm of T. W. Shows & Co.

It is insisted by counsel for appellees that every presumption should be indulged in favor of the finding of the chancellor on the facts, and that unless the preponderance of the testimony is against the finding of the chancellor this court should not disturb his decree. The doctrine here invoked is directly opposed to the express language of the statute, section 3826, subdiv. 1, which reads as follows: "The Supreme Court has authority—
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the State, under such restrictions and regulations as are prescribed by law; but in deciding appeals from the chancery court no weight shall be given the decision of the chancellor upon the facts, but the Supreme Court shall weigh the evidence, and give judgment as they deem just." It is thus made plain by the statute, that no presumption can be here indulged in favor of the chancellor's finding on the facts, and our plain duty is to weigh the evidence and give judgment as we deem just.

Our conclusion is, that the allegations of the bill are not sustained by the proof. And it follows, that the decree of the chancellor must be reversed, and a decree will be here rendered dismissing the bill.

Reversed and rendered.

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Action by Employee against Employer to recover Damages for Personal Injuries.

1. *Action by employe against employer; contributory negligence.*

In an action by an employe against a cotton mill company to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the superintendent of such cotton mill in directing the plaintiff to put a belt upon a pulley which, at the time, was in motion, and making three or four hundred revolutions per minute, where the evidence shows plaintiff was an experienced mill man, had worked for a long time in the mill in which his injuries were received, and in the capacity of foreman of the section of the mill in which he was hurt, and he knew all about putting belting upon pulleys in motion, the fact that the plaintiff obeyed the orders of the superintendent in attempting to put the belt upon the pulley while in motion, if there was danger in making such attempt, showed such want of care and prudence on the plaintiff's part—such negligence contributing to his own injury—as to constitute a full defense against the alleged negligence of the superintendent in giving the direction.

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2. *Same; sufficiency of evidence showing negligence.*—In an action against a cotton mill company to recover damages for personal injuries sustained by the plaintiff while he was attempting to put a belt upon a pulley which was in motion and making between three and four hundred revolutions a minute, one of the counts of the complaint charged that the superintendent of the defendant's mill negligently ordered another employe to raise the belt with a pole while the plaintiff was engaged in putting in on the pulley, and that in carrying out such order the other employe raised the belt in such manner as to cause it to lap and double around the revolving shaft, on which was the pulley, and as a result of the lapping and doubling of the belt, the plaintiff's arm was caught therein and inflicted the injury complained of. The evidence showed that the superintendent had directed the other employe to raise the belt with a pole, but there was a total lack of evidence to show that the lapping and doubling of the belt was a necessary or a probable result of lifting the belt with a pole, or that such result could have been within the reasonable apprehension of an ordinarily careful superintendent. *Held:* That such evidence was not sufficient to support the charge that the superintendent was guilty of negligence in giving the order to the other employe to raise the belt, and that, therefore, the plaintiff was not entitled to recover upon such count.

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon. JOHN PELHAM.

This was an action brought by the appellee, Lon Williams, against the appellant, the Coosa Manufacturing Company, to recover damages for personal injuries.

The complaint contained nine counts. The court sustained the defendant's demurrer to the first, second, third, fourth, fifth and eighth counts of the complaint, and the record recites that issue was joined on the pleas filed to the sixth, seventh and ninth counts. The seventh count was in words and figures as follows: "7th. The plaintiff claims of the defendant the further sum of twenty-five thousand dollars damages, for that whereas, to-wit, on the night of the 11th of December, 1900, while defendant was engaged in operating its cotton mill at Piedmont, in Calhoun county, Alabama, manufacturing cotton, the machinery in said cotton mill was driven and propelled by an engine, shafting, pulley and belts. Said shafting and pulley were situ-

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ated several feet above the floor and machinery in said cotton mill, and the only means or way to reach said shafts and pulley to put belts on said pulleys was by the use of a ladder with one end resting on the floor of said cotton mill and the other end leaning against the revolving shaft. At the time that plaintiff received the injury hereinafter complained of it became necessary for a belt to be put on one of the pulleys on the revolving shaft, against which the upper end of the ladder leaned, which shaft was running from 300 to 400 revolutions per minute, and plaintiff at the time he received the injury was in the employ of the defendant in the twisting and spooling department in said cotton mill, and a part of plaintiff's duties as such employe was to put the belts on these pulleys when necessary, and while running from 300 to 400 revolutions per minute at the time when said belt had to be put on; and while the plaintiff was engaged in his employment in defendant's said cotton mill and it became necessary for one of the pulleys to have the belt put on it, plaintiff ascended said ladder to the shaft, against which said ladder was leaning, which was the only way of reaching the said shaft and pulleys provided by defendant for the purpose of putting on belts on said pulleys, and it was necessary at the time of the injury to plaintiff to put a belt on said pulley and was a part of plaintiff's duty under his employment to put on said belt; that on reaching the shaft and pulley to be belted at the upper end of said ladder, plaintiff took hold of a pipe with his left hand to steady and support himself, and with his right hand raised said belt to put it on said pulley, there being no way or means provided for standing while putting on said belt except a round or step of said ladder, and while plaintiff was so situated in said position, defendant's superintendent, J. H. Barlow, being present directed one Howard Busby, an employe in defendant's said cotton mill, whose duty it was to obey said superintendent J. H. Barlow, who was present standing on the floor, to raise the belt with a pole, which belt plaintiff was putting on, the said Howard Busby obeyed said superintendent, J. H. Barlow,

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and jabbed the pole he had in his hand up against said belt, which caused said belt to lap and double around said revolving shaft carrying plaintiff's right hand and arm with the belt around said shaft, breaking plaintiff's right arm in four places and crushing the bone in his arm, and breaking his right hand also, which caused great and permanent injury to plaintiff. Plaintiff avers that by reason of defendant's superintendent J. H. Barlow's gross negligence in giving to said Howard Busby directions to raise said belt with the end of the pole he had in his hand, while plaintiff was putting on the belt, and the said Busby obeying said superintendent's directions, which was his duty to do, and did obey said superintendent J. H. Barlow, by raising said belt with said pole which caused said belt to lap and catch plaintiff's right hand and arm and carry it around the shaft breaking and crushing plaintiff's right hand and arm and caused plaintiff's said injuries, to the damage of plaintiff in the sum of twenty-five thousand dollars, as aforesaid, hence this suit."

The ninth count, after the prefatory averments as to the operation by the defendant of a cotton mill and the employment therein of the plaintiff, and the injury sustained by the plaintiff in trying to put a belt upon a pulley, as substantially averred in the seventh count, then continued as follows: "Plaintiff avers that by reason of the gross negligence of J. H. Barlow, who was intrusted with the superintendence of defendant's said cotton mill, in directing plaintiff to put said belt on said pulley at a time when said shaft and pulley was revolving from 300 to 400 revolutions per minute, and said cotton mill was in operation, without stopping said shaft and pulley while plaintiff was putting on said belt. Plaintiff avers that if the said J. H. Barlow had stopped said shaft and pulley while putting on said belt, he being then and there present, the injury would not have occurred. Plaintiff further avers that the said J. H. Barlow, superintendent as aforesaid, was superior to plaintiff, and to whose orders and directions plaintiff was bound to obey and did obey, and such injury resulted from his having obeyed said directions, and the

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failure of said J. H. Barlow to stop said shaft and pulley while plaintiff was putting on said belt, all of which gross negligence in the said J. H. Barlow caused said injuries to the damage of the plaintiff in the sum of twenty-five thousand dollars, hence this suit."

The sixth count was as follows: "The plaintiff claims of the defendant the further sum of two hundred dollars as special damages because by reason of the injuries received as set out in the seventh and ninth counts of the complaint hereinabove, he had to employ physicians to attend to his injuries and wounds, and had to become liable to his physicians for the sum of two hundred dollars for medical attention and treatment of his said wounds."

The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The first, second and third charges requested by the defendant, and to the refusal to give each of which the defendant separately excepted, were as follows: (1.) "If the jury believe the evidence, they must find for the defendant." (2.) "If the jury believe the evidence, they must find for the defendant under the ninth count of the complaint." (3.) "If the jury believe the evidence, they must find for the defendant under the seventh count of the complaint."

There were verdict and judgment for the plaintiff, assessing his damages at 2,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

J. F. MARTIN and J. J. WILLETT, for appellant.—The appellant insists that the evidence shows that the plaintiff's injuries were occasioned by an accident, and comes within the rule as laid down in *Erwin v. Evans*, 56 N. E. Rep. 725; *Wabash Paper Co. v. Webb*, 45 N. E. Rep. 474; *Central R. R. & B. Co. v. Letcher*, 69 Ala. 106; *Cooley on Torts*, § 674.

MATTHEWS & WHITESIDE, *contra*.

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MCCLELLAN, C. J.—The plaintiff was an experienced mill man. He had worked for a long time in the mill in which his injuries were received, and at the time of receiving them he was and had for months been the foreman of that section of the mill in which he was hurt. He knew all about belting pulleys in motion. If there was danger in attempting to belt the pulley he was engaged in belting at the time of his injury while it was in motion, he knew of that danger, its character and extent fully as well as Barlow, defendant's superintendent; and that danger, certainly to a man of his acknowledged experience and familiarity with the matter in hand and the environment, was an obvious danger. So that, on the assumption upon which we are now proceeding, the plaintiff was under no duty to subject himself to this danger at the command of Barlow, the superintendent, and his doing so was such want of due care and prudence—such negligence contributing to his own hurt—as to constitute a full defense against the alleged negligence of Barlow in directing him to belt the revolving pulley. On the other hand, if the belting of the revolving pulley was not a dangerous thing for Williams to undertake, it was not negligence in Barlow to direct him to do it; and plaintiff can take nothing on account of Barlow's said order. In any view of the case, therefore, the defendant was entitled to the affirmative charge on the ninth count of the complaint.

The seventh count, upon which with the ninth the trial was had, charges that Barlow negligently ordered Busby to raise the belt with a pole while plaintiff was engaged in and about putting it on the pulley, and that in carrying out this order Busby so raised the belt as to cause it to lap and double around the revolving shaft, on which was the pulley over which the belt was to be placed, and that this lapping and doubling of the belt around the shaft operated to catch plaintiff's arm and inflict the injury complained of. There is some evidence tending to show that Barlow directed Busby to raise the belt with the pole; but there is a total absence of evidence going to show the lapping and doubling of the belt around the shaft was a necessary, probable, or likely result of raising the belt by means of the pole as directed

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by Barlow, or that the result should or could have been within the reasonable apprehension of an ordinarily careful and prudent man in Barlow's place; nor was there anything inherent in the act of so raising the belt to stamp it as a thing at all dangerous to the comprehension of a careful man. The belt had to be raised in order to get it over the pulley. For Busby to raise it with a pole would seem in all reason to lessen whatever danger there may have been in Williams' effort to get it on the pulley. It would seem, too, to all reasonable observation that it could be safely raised without lapping or doubling it on the shafting by placing the end of the pole on the under or inner side of it, and that such lapping or doubling would not ensue at all unless the pole were applied obviously improperly to the end in view to the outside of the belt, thereby shoving the two parts below the pulley against each other, and jamming and doubling the one side up under the other and between it and the shafting. We are, therefore, of the opinion that the evidence does not at all support the charge that Barlow was guilty of negligence in the order given to Busby to raise the belt with the pole; that the only negligence in the premises of which there was any evidence was that of Busby in the manner of attempting to execute a proper order, which negligence is not counted on, and for which defendant could not be held responsible to this plaintiff, and that the defendant was entitled to the affirmative charge on this seventh count also.

What is called the sixth count is no count at all, but a mere averment of special damage under counts seven and nine.

For the errors committed by the court in refusing charges 1, 2 and 3 requested by the defendant—affirmative charges with hypotheses on the complaint and on counts 7 and 9, respectively—the judgment must be reversed. The cause is remanded.

Reversed and remanded.

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Mayor and Aldermen of Talladega v. Fitzpatrick.

Action to recover Fine imposed for Violation of City Ordinance.

1. *Ordinance of municipality for disturbing religious worship; validity thereof.*—The ordinance of a city which provides that "any person who interrupts or disturbs any congregation or assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior," etc., "must, on conviction, be fined not less than one nor more than one hundred dollars," is not in conflict with the statute of the State defining the offense of disturbing an assemblage met for religious worship; but the passage of such ordinance is the valid exercise of the powers conferred upon said city under a charter giving it authority to preserve the peace and good order of the city; nor is such ordinance unreasonable.
2. *Action by city to recover fine imposed by mayor; complaint not demurrable for claiming amount paid.*—Where, on an appeal taken from a conviction before the mayor for the violation of a city ordinance, a complaint is filed by the city, the fact that in such complaint the city claimed the amount of the fine imposed on the defendant by the mayor, does not render it demurrable.

APPEAL from the City Court of Talladega.

Tried before the Hon. G. K. MILLER.

This case originated in the mayor's court of Talladega by the prosecution of the appellee, Wiley Fitzpatrick, for disturbing religious worship under an ordinance of the city of Talladega. The defendant was convicted in the mayor's court and fined \$75. He then took an appeal to the city court. In the city court of Talladega, the city in its corporate name filed a complaint in assumpsit against the defendant setting out the ordinance in full and claiming the sum of \$75, the amount of the fine imposed upon the defendant.

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The other facts of the case are sufficiently stated in the opinion. The city appeals from the judgment sustaining the demurrers of the defendant interposed to the complaint, and assigns the rendition of said judgment as error.

W. T. EDWARDS and J. W. VANDIVER, for appellant, cited 18 Amer. & Eng. Ency. of Law, 750, note 7; *Ex Parte Andrews*, 18 Cal. 768; *Mayor and Ald. of Mobile v. Allaire*, 14 Ala. 400; 5 Amer. & Eng. Ency. of Law, 721; Russell on Crimes (5th Am. ed.), 301; *Van Horn v. Selma*, 79 Ala. 361; *Ex parte Cowert*, 92 Ala. 94; *Ex parte Marshall*, 64 Ala. 266; *Ex parte Sikes*, 102 Ala. 173; *Salter's case*, 99 Ala. 207; *Mayor v. Rouse*, 8 Ala. 515; *State v. Estabrook*, 6 Ala. 653; 1 Brick. Dig. 407, § 85.

WHITSON & GRAHAM, *contra*.—The ordinance conflicts with the State statute in its very essence since it is impossible to conceive of a person being guilty under the State statute, unless the act which disturbs the assembly is the product of the will.

No special power is conferred upon the city of Talladega to enact an ordinance on the same subject, and for the identical offence covered by the State law, materially different and variant, from the general law of the State. Hence, the authorities which hold that where a special power is given in the charter to impose a license upon a business is valid and not in conflict with the above cited section of the constitution, although the State does not impose any license on such business or occupation have no application.—*Anniston v. Southern R'y. Co.*, 112 Ala. 557.

"Unless it is otherwise clearly provided in the charter or by some statute of the State," in case of conflict between the general laws of the State and ordinance of the municipal corporation, the ordinance is void—1 Dillon on Mun. Corporations, §§ 367, 330, 317; 17 Am. & Eng. Ency. Law, p. 248, and notes.

"An ordinance which is repugnant either to the constitution or general laws is *ipso facto* void.—17 Am. &

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Eng. Ency. Law, (1st ed.), p. 251, note 2; *State v. Burns*, 45 La. Ann. p. 34; *Same case*, 11 So. Rep. 8, 887.

HARALSON, J.—The ordinance of the city under which the defendant was arrested, tried and convicted, reads: "Any person who interrupts or disturbs any congregation or assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or any other act at or near such place of worship, must, on conviction, be fined not less than one nor more than one hundred dollars." This is a transcript of the statute on the subject making it an offense against the State, to disturb religious worship, except as to the penalty imposed and that the word, "willfully," is omitted in the ordinance before the word "interrupts."

The affidavit on which defendant was arrested, and the complaint in the city court, on appeal by the defendant from his conviction by the mayor, charged the offense in the language of the ordinance,—“that said defendant, on, to-wit, the 28th day of July, 1901, did interrupt or disturb a congregation or assemblage of people, met for religious worship in the city of Talladega, at the Peace Baptist Church in said city, by noise, profane discourse, rude or indecent behavior, in violation of said ordinance,” etc.

The defendant demurred to the complaint, on grounds, substantially, that this ordinance was in conflict with the statute of the State, defining the offense of disturbing an assemblage met for religious worship, in this, that the act of disturbance, under the ordinance, need not be willful or intentional, to constitute a violation thereof; that it was not averred, that the defendant did willfully interrupt or disturb the congregation; and that the ordinance was unreasonable, in that any act however innocently or unintentionally done, which interrupts or disturbs such a congregation, is a violation of the ordinance. The court sustained the demurrer, and the city appeals.

The charter of the city bestows on the mayor and aldermen the power to preserve the peace and good order of the city (section 5); and to make and adopt by-laws and ordinances, upon whatever subject, not inconsistent

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with the laws of the State, for the good government and order of the city, and such as shall be needful for the government, police interest, welfare and good order of the city (section 18).—Acts, 1900-1901, p. 1557.

It was competent for the general assembly to delegate such power to the municipality, which, when enacted into an ordinance, had the force, as to persons bound thereby, of a statute passed by the legislature itself.—*Moses v. Mayor*, 52 Ala. 207. The power to enact such ordinances was bestowed, not to punish for an offense against the public justice of the State, but to provide a police regulation for the enforcement of good order and quiet within the limits of the corporation. It was altogether immaterial, in bestowing this power on the city, whether the State had created this offense against its own laws or not. The offense against the corporation and the State are distinguishable, the one intended for the peace and good order of the city, and the other, for the maintenance of good government and the dignity of the State.—*Mayor v. Allaire*, 14 Ala. 400; *City Council v. M. & W. P. R. Co.*, 31 Ala. 83. If no statute had ever been enacted by the State, to punish persons for disturbing religious worship, it would have been perfectly competent for the legislature to confer the power on the city to adopt such an ordinance as a police regulation.—*City of Anniston v. So. R. Co.*, 112 Ala. 558; *Holt v. Mayor*, 111 Ala. 369.

At common law any disturbance of a lawful assembly of people met for religious purposes is indictable.—5 Am. & Eng. Ency. Law (1st ed.), 721. The statute in this State on the subject does not abrogate the offense at common law. Mr. Bishop treating the subject, defines disturbance “to be any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress and services, or is annoying to the congregation in whole, or in part.”—2 Bish. Cr. Law, § 309. The act must have been pursuant to design, and not done through mere accident or mistake.—*Ib.* § 308.

Our later adjudications, in construing the State statute on the subject (Code, § 4654), establish, “that a pur-

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pose and intent to disturb is not a necessary factor in the crime, but on the contrary, that any act, which is within the terms of the statute, the natural consequence of which is to disturb, and which is willfully done, and which in fact does disturb an assembly of people, met for religious worship, comes under the denunciation of the law, though the actor may have had no intent to disturb the assembly."—*Salter v. State*, 99 Ala. 207, and authorities there cited.

When properly construed, therefore, it is seen, that the statute and ordinance of the city mean the same thing, in substance and legal effect.

The ordinance is not unreasonable. Under it no one could be convicted for any act innocently done by mistake or accident, the natural consequence of which was not to interrupt or disturb the assembly. What would be a disturbance under the ordinance, is a question for the jury, under proper instructions from the court.

That part of the complaint which claims \$75, the amount of the fine imposed on the defendant by the mayor, was unnecessary and mere surplusage. It might have been stricken, but did not render the complaint demurrable.

Reversed and remanded.

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Bill in Equity by Junior Mortgagee to redeem.

1. *Bill by junior mortgagee to redeem; should offer to do equity.*

Where a bill is filed by a junior mortgagee against the holder of a senior mortgage and seeks an accounting from him and the foreclosure of the mortgage held by the complainant, and that the complainant be allowed to redeem, it is necessary that such bill should offer to pay such sum as may be ascertained to be due upon the first mortgage; and in the absence of such offer the bill is subject to demurrer.

2. *Same; necessary that second mortgage should be due and payable.*—One of the essential requisites of maintaining such a

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bill is that the mortgage debt of the complainant should be due and payable; and if the bill filed for such purpose does not aver that the complainant's mortgage is due and payable at the time of the filing thereof, it is subject to demurrer.

APPEAL from the Chancery Court of Morgan.

Heard before the Hon. WILLIAM H. SIMPSON.

The bill in this case was filed by the appellant John Higman, against the appellees, Milton Humes, John H. Sheffey and Harry C. Higman. The bill averred that the defendant, Milton Humes, held a mortgage upon property owned by Harry C. Higman; that this mortgage was executed on January 14, 1888; that said mortgage contained a power of sale which had never been executed "nor has there ever been any foreclosure of said mortgage to which this complainant was a party." It was then averred that on October 27, 1889, the said Harry C. Higman executed a mortgage to the complainant in which he conveyed the same property included in the mortgage held by Humes; that said mortgage to the complainant had never been paid and that in 1897, the defendant Humes took possession of the premises included in said mortgage, received the rents amounting to a large sum and has torn down and destroyed many of the valuable improvements upon said property. It was also averred that John H. Sheffey claimed some interest in said premises which had been acquired since the execution of the mortgage to complainant.

The prayer of the bill was that Humes be required to account for the waste committed by him, that he be charged with the cost of the damage done and rents collectible, "and that this complainant be allowed to redeem said premises from under the mortgage to Humes," and that an accounting be taken as to the amount received by said Humes on said mortgage and that the mortgage to the complainant be foreclosed.

The defendants, Milton Humes and John H. Sheffey, demurred to the bill, among others, upon the following grounds: 1. Said bill fails to allege whether said mortgage alleged to have been executed to the complainant is due, and fails to allege when it was due. 2. Said bill fails to tender the amount due on said mortgage

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to said Humes and others, and does not offer to pay such sum as may be ascertained to be due thereon.

On the submission of the cause on the demurrer, the chancellor rendered a decree sustaining the grounds of demurrer as above set out, and overruled the other grounds. From the decree sustaining these grounds of demurrer the complainant appeals, and assigns the rendition thereof as error.

E. W. GODBEY, for appellant, cited *Hartford Ins. Co. v. Kirkpatrick*, 111 Ala. 456; *Springfield Ins. Co. v. Hull*, 25 L. R. A. 37.

HUMES, SHEFFEY & SPEAKE, *contra*.

TYSON, J.—The bill in this cause is filed by a junior mortgagee against the holder of a senior mortgage and seeks an accounting from him, and the foreclosure of the mortgage held by the complainant. It is so clearly a bill for redemption that it is unnecessary to discuss its nature and character. There is no offer contained in it to pay such sum as may be ascertained to be due upon the first mortgage. "A suit to redeem is a suit in equity and is subject to the rule that he who seeks equity must do equity."—2 Jones on Mortgages (5th ed.), § 1070 and note 11. The essential requisites of maintaining this suit are, that the mortgage debt should be due and payable, that the complainant should offer to pay the same when ascertained and fixed by the decree. Indeed without such an offer the bill is wanting in equity.—*Fouche v. Swain*, 80 Ala. 151; *Smith v. Comer*, 65 Ala. 371; 3 Pom. Eq., § 1219 and note 2; 2 Jones on Mortgages, § 1095; 17 Ency. Pl. & Pr., p. 965. If complainant "is unable to foreclose his mortgage, for the reason that it is not due or for other cause, then he cannot redeem a prior mortgage against the consent of the holder of it; for in such case he cannot bring the mortgagor before the court for the purpose of completing his remedy by foreclosure and he cannot compel the mortgagee to assign to him."—2 Jones on Mortgages, § 1102. The bill under consideration was clearly subject to the grounds of demurrer which the chancellor sustained.

Affirmed.

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136 168**Adair & Co. v. Feder *et al.****Bill in Equity to annul Attachment Proceedings.*

1. *Sufficiency of plea in chancery suit; how considered on appeal; when no ruling shown.*—Where in a chancery suit, there are pleas interposed and a motion to strike them is filed, but such motion was not considered by the court, nor submitted to be passed on, it will be presumed, on appeal, that the motion was abandoned, and that the cause was tried upon issue taken on said plea.
2. *Same; decree should be rendered for defendant if pleas proven.* If the defendant in a chancery suit pleads to the whole bill and the complainant takes issue on the plea and it is established by the testimony, a decree should be rendered for the defendant and the bill dismissed; and this is true though the plea was insufficient and would have been so held if properly attacked.
3. *Bill to annul proceedings in attachment suit; burden of proof; sufficiency of evidence.*—Where a bill is filed by creditors to have annulled proceedings in an attachment suit, whereby the goods of complainant's debtor were seized and sold, upon the ground that the attachments were sued out by the attaching creditors in collusion with the debtor, without the existence of any statutory ground therefor, and for the purpose of hindering, delaying and defrauding the complainants and other creditors, the burden of proving the charges made is upon the complainant; and where the evidence introduced shows without conflict that the defendant in attachment was indebted to the plaintiffs in said suit and the evidence further tended strongly to show that there was at least probable cause for the issuance of the attachment, the averments of fraud contained in such bill are not sustained, and upon such evidence the complainants are not entitled to relief.
4. *Attachment; mere fact that the defendant knew of issuance does not show fraud.*—The mere knowledge on the part of the defendant in attachment that the plaintiffs in such suit were purporting to sue out writs of attachment, or a willingness on the part of such defendant that the attachment should be sued out, does not, of itself, raise the presumption that there was a covinous agreement or fraudulent collusion between the plaintiffs and the defendant in suing out the attachment.

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APPEAL from the Chancery Court of Henry.

Heard before the Hon. WILLIAM L. PARKS.

The bill in this case was filed by the appellees as creditors of J. R. Adair & Co. The purpose of the bill and the facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

Upon the final submission of the cause upon the pleadings and proof, the chancellor decreed that the complainant was entitled to the relief prayed for, and ordered accordingly. From this decree the defendants appeal, and assign the rendition thereof as error.

J. B. DELL, for appellants.—The court erred in rendering decrees against Margaret Keller and John Ginn. Each of these parties filed pleas to the jurisdiction of the court, and the complainants made a motion to strike each of the pleas from the file for causes set out. This motion was never passed on by the court and is, therefore, waived.—*Elyton v. Morgan*, 88 Ala. 434; *American Mortgage Co. v. Inzer*, 98 Ala. 608; 6 Ency. Pl. & Pr., 379. The waiver of this motion left these respondents with their pleas in the record and proven by the evidence. This entitles them to a decree in their favor. *Tyson v. Land Co.*, 121 Ala. 414; *Johnson v. Common Council*, 127 Ala. 244.

It was not shown by the evidence that the attachments were sued out in fraudulent collusion between the attaching creditors and the defendant debtor.—*Builders, etc., Supply Co. v. First Nat. Bank*, 123 Ala. 203.

H. A. PEARCE and ESPY, FARMER & ESPY, *contra*. The allegations of the bill give it equity.—*Henderson v. Brown*, 125 Ala. 566; *Collier v. Wertheimer*, 122 Ala. 320; *Gassenheimer v. Kellogg*, 121 Ala. 109; *Weingarten v. Marcus*, 121 Ala. 187; *Comer v. Heidelberg*, 109 Ala. 220.

SHARPE, J.—Creditors of J. R. Adair & Co. seek by this bill to have annulled proceedings in certain attachment suits whereunder the goods of that firm were seized and sold, and to hold the plaintiffs in those suits to ac-

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count as trustees *in invitum* for the proceeds of the goods. The alleged ground upon which the relief is sought is that the attachments were sued out in collusion with the debtors, without the existence of any statutory ground for such process and for the purpose of hindering, delaying or defrauding the complainants and other creditors.

Only the defendant Bank of Dothan filed an answer. Decrees *pro confesso* were taken against the members of the firm of J. R. Adair & Co., and the remaining defendants, John Ginn and Margaret Keller, each filed a plea setting up their non-residence as a bar to the court's jurisdiction to decree relief against them.

The legal sufficiency of these pleas was not tested, for though a motion to strike them out was filed, that motion was not tried or submitted to be passed on, and, therefore, must be treated as abandoned.—*American Mortgage Co. v. Inzer*, 98 Ala. 608; *Elyton Land Co. v. Morgan*, 88 Ala. 434 6 Ency. Pl. & Pr., 370. The cause having been submitted for final decree on these pleas among other matters without objection urged, it is presumed that issue was taken on them.—*Tyson v. Decatur Land Co.*, 121 Ala. 414. Without dispute the non-residence of the two last named defendants was proven and for that, if for no other reason, they were entitled to have the bill dismissed as to them.—*Tyson v. Decatur Land Co.*, *supra*; *Johnson v. Common Council*, 127 Ala. 244.

The evidence does not in our opinion sustain the bill's averments of fraud. Without conflict it proves the debts on which the attachments were issued in favor of the defendants, respectively, and also circumstances tending strongly to show there was at least probable cause for their issuance. There is nothing to show that Adair & Company retained any interest in the goods or received any benefit from the transaction. If they did so and if the fact be material the burden of proving it was on the complainants.—*Murray v. Heard*, 103 Ala. 400.

It appears the several attachments were sued out about the same time and by the same attorneys, and

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that complainants' witness Baker was one of the attaching creditors. His testimony tends to show defendant J. R. Adair assented to the suing out of his attachment, and was present at the office of those attorneys when the other attachments were being sued out and had knowledge of what was being done. Complainants' only other witness was the notary who issued the attachments. He first testified that according to his recollection J. R. Adair was in the office of the attorneys referred to when the writs were issued to the constable, but on cross-examination he said he was not positive that Adair was then present, and that if he was he neither said nor did anything about the attachments.

On the other side is the testimony of the constable denying that Adair was present when he received the writs and of the two bank officers affirming the good faith of the bank's action and that of Adair which, if true, is inconsistent with collusion as between him and any of these defendants.

If it should be assumed as proven that Adair was in active accord with the bringing of Baker's suit his attitude towards the suits of these defendants would still be left conjectural. Certainly Adair's mere knowledge of defendants' purpose to sue or his willingness to be sued, if shown, would not of itself warrant the conclusion that defendants were parties to any covinous agreement or were acting in fraudulent concert with the defendants in attachment.—*Warren v. Hunt*, 114 Ala. 506.

The decree appealed from will be reversed, and one will be here rendered dismissing the bill and directing that complainants pay the costs in the chancery court as well as costs of appeal.

Reversed and rendered.

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Southern Car and Foundry Co. v. State of Alabama.

Action to recover License Tax.

1. *Action for license tax; sufficiency of plea.*—In an action to recover a license or privilege tax, a plea which avers that the defendant “procured a license from the proper authorities to do business in Alabama for the time mentioned in the complaint,” is bad and subject to demurrer, in that it does not aver in said plea that the license alleged to have been procured was paid for.
2. *Same; same; statute of limitations.*—Under the authority of the statute, (Acts of 1898-99, p. 202, § 16), a suit for the recovery of a license tax can be brought any time within five years from the time the license becomes due; and, therefore, in an action to recover a license tax, pleas setting up the statute of limitations of one and two years as a bar to the action are bad and subject to demurrer.
3. *License tax; sale by one corporation to another does not assign a license.*—The purchase of the stock, property and business of one corporation by another corporation, does not authorize the latter company to do business under a license issued to the former company, nor is the latter company entitled to be credited to the amount of the license tax paid by the selling company on a license tax acquired by the buying company for the years in which the purchase is made.
4. *Same; statute imposing such tax on corporations constitutional.* The statute requiring all corporations, foreign and domestic, doing business in this State, not otherwise specially required to pay a license tax, to pay an annual privilege tax graduated by the paid up capital of the corporation, (Code, § 2142, subd. 55), is the exercise of legitimate authority of the legislature, and such statute is valid and not unconstitutional.
5. *Same; interest recoverable.*—Interest is recoverable on unpaid license taxes.

APPEAL from the City Court of Anniston.
Tried before the Hon. THOS. W. COLEMAN, JR.

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[Southern Car and Foundry Co. v. State of Alabama.]

This action was brought by the appellees against the appellant, to recover a license privilege tax for the years 1899, 1900, 1901 and tax commissioners' fees thereon, the amount of said taxes being five hundred dollars for one year and the fees fifty dollars on each amount.

The defendant pleaded the general issue and several special pleas. The third plea was as follows: "Third: That it had procured license from the proper authorities to do business in Alabama for the time mentioned in the complaint." The other special pleas referred to in the opinion are sufficiently shown therein. The plaintiff demurred to the third plea upon the ground that it fails to aver that the defendant had paid for and taken out a license under which the suit was brought, and that it does not aver that the licenses were taken out before suit was brought. This demurrer was sustained. The demurrers interposed to pleas four and four and a half and five were upon the ground that said pleas presented no defense to the action, and that the statute of limitations of one and two years was no bar to the recovery of the license tax. These demurrers were sustained.

The cause was tried by the court without a jury, upon an agreed statement of facts which was in words and figures as follows: "That the defendant, Southern Car and Foundry Company, is a corporation organized under the laws of the State of New Jersey; that said corporation was organized some time before June 1st, 1899, and that on June 1st, 1899, it had and that it has had continuously since that date a paid up capital stock exceeding one million dollars; that the defendant engaged in business in Calhoun county, Alabama, viz., in the business of building cars, etc., on the first day of June, 1899, and that it has continued in business in said county during the years 1899, 1900 and 1901 to the present, having been engaged during all of said time at Anniston in said county in the building of cars, etc.; that the defendant had not taken out any license from the judge of probate of Calhoun county to do business in the State of Alabama, for any one of said years, and that before the bringing of this suit the tax commissioner of Calhoun county reported to the judge of pro-

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bate of said county the failure of the defendant to take out such license for each of said years and that the defendant failed or refused to take out such license, and that thereupon this suit was brought; that while the defendant had during the said years 1899, 1900 and 1901 a paid up capital stock exceeding one million dollars, only two hundred thousand dollars of its said capital stock was invested in property or business in the State of Alabama, the balance of its capital being invested in other States or used in business in other States. That the Southern Car & Foundry Company had prior to the first day of June, 1899, purchased the stock, property and business of the Elliott Car Company, a corporation existing under the laws of Alabama, located at Gadsden, Alabama, having a capital stock of one hundred and fifty thousand dollars, and that said Elliott Car Company had taken out a license to do business in the county of Etowah for the year 1899, having paid therefor the sum of \$75 to the State and \$37.50 to the county of Etowah; that for the year 1900 the Southern Car and Foundry Company paid to the judge of probate of Etowah county the sum of \$75 for the State and \$37.50 for the county; and like sums for the year 1901; and for this sum the judge of probate of Etowah county issued to it a license to do business as a corporation for each of said years; that except as above stated the Southern Car and Foundry Company did not pay any license taxes to the State or to any county for the years 1899, 1900 or 1901, and that no license was issued in the name of the Southern Car and Foundry Company for 1899, and that it paid only \$75 to the State for 1900, and a like sum of \$75 for 1901; that the Southern Car and Foundry Company is authorized and empowered under its charter to engage in the manufacture of cars, to operate rolling mills, machine shops, and to do a general manufacturing business; that on June 1, 1899, the Southern Car and Foundry Co. took a lease from the Illinois Car and Equipment Co., of its property in Calhoun county, Alabama, and operated the plant of the latter company in said county for the remainder of the year 1899; and that said Illinois Car and Equipment Company was a corporation

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organized under the laws of New Jersey, having a paid up capital stock of over one million dollars, and had paid a license tax of five hundred dollars to the State of Alabama, and two hundred and fifty dollars to the county of Calhoun for the year 1899, and a license had been duly issued to it, I. C. & E. Co., for that year." The court rendered a judgment for the plaintiff, taxing the amount of his recovery at \$1,701.33. To the rendition of this judgment defendant duly excepted. The defendant appeals, and assigns as error the rulings of the court in sustaining the demurrers to the pleadings and the rendition of judgment in favor of the plaintiff.

J. J. WILLETT, for appellant.—Taxes imposed upon privileges of corporations are taxes upon their property and are subject to the limitations of the constitution requiring the property of corporations to be taxed like that of individuals, in proportion to its real value. *Gulf, etc., R. R. Co. v. Hewes*, 22 Sup. Ct. Rep. 26; *Wilmington, etc., R. R. Co. v. Reid*, 13 Wall. 264; *Adams Express Co. v. Auditor*, 163 U. S. 195; *Veazie Bank v. Fenno*, 8 Wall. 533.

If the privilege tax for doing business in Alabama is a property tax, it is contrary to the constitution of Alabama, where it seeks to make the corporation pay a tax based upon a million dollar capital stock when only two hundred thousand dollars was used in its business in the State of Alabama—because it would be repugnant to the constitution of Alabama of 1875, section 1, article XI, Code of 1896, page 94.

CHAS. G. BROWN, Attorney-General, and W. P. ACKER, *contra*.—The court sustained a demurrer to the pleas, and properly so, for the recovery of a license tax is expressly authorized to be brought at any time within five years.—Acts, 1898-99, p. 202, § 16.

The legislature has not exceeded its authority in basing the amount of the license tax upon the entire capital stock of the corporation. This has been expressly decided by this court and by the Supreme Court of the United States.—*Phoenix Carpet Co. v. State*, 118 Ala.

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43; *Horn Silver Mining Co. v. People*, 143 U. S. 305; *Home Ins. Co. v. People*, 134 U. S. 594.

The statute makes no distinction between foreign and domestic corporations, and it is clearly settled by the Supreme Court of the United States that a foreign corporation cannot complain that it is subjected to the same law as a domestic corporation. The extent of the tax is purely a matter for the legislature and any interference with it is beyond the jurisdiction of the courts. A tax on corporate franchises has no limitations, but the discretion of the taxing power.—*Horn Silver Min. Co. v. People*, *supra*; *Home Ins. Co. v. People*, *supra*. The plaintiff was entitled to a judgment for the amount of the taxes for the three years with interest thereon. Code, § 4008; *Jebeles v. State*, 117 Ala. 174.

DOWDELL, J.—This is a suit by the State to recover of the defendant, Southern Car & Foundry Co., a corporation, a license tax for the years 1899, 1900 and 1901, and the tax commissioner's fees thereon. The cause was tried by the court without a jury, on an agreed statement of the facts, and a judgment was rendered in favor of the State, from which the defendant appeals.

The first assignment of error challenges the court's ruling in sustaining the plaintiff's demurrer to the third plea. This plea was bad, if for no other reason, in not averring that the license alleged to have been procured, was paid for, and was open to that ground of demurrer.

Demurrers were also sustained to pleas 4, 4½, and 5,—assignments of error 2, 3 and 4. These pleas set up in answer to the complaint, the statute of limitations of one and two years. The statute expressly authorizes suit for recovery of a license tax at any time within five years.—Acts, 1898-99, p. 202, § 16. The court properly sustained the demurrers to these pleas.

The purchase of the stock, property and business of the Elliott Car Co. by the defendant company, did not authorize the latter company to do business under a license issued to the former company for the year 1899, nor was it entitled to a credit, to the amount of the

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license tax paid by the Elliott Car Co., on the amount of the license tax required of the defendant company for that year. A license is personal, and cannot be assigned. But it is not even pretended here that there had been any assignment of its license by the Elliott Car Co. to the defendant.—*Long v. State*, 27 Ala. 32; 2 Am. & Eng. Ency. Law (2d ed.), p. 1049 and notes.

The defendant company is a foreign corporation and its paid up capital stock exceeds one million dollars (\$1,000,000). Section 4122, subdivision 55 of the Code provides: "All corporations doing business in this State, whether organized in this State or in another State or country, not otherwise specifically required to pay a license-tax, shall pay annually the following privilege taxes: * * * Corporations whose paid up capital stock exceeds one million dollars, five hundred dollars." This provision of the statute is too plain to call for construction. There is nothing here upon which to base an argument that the legislature intended the amount of the license tax to be regulated by the amount of the capital stock actually employed in the business. The amount of the license tax is expressly based upon the entire capital stock, paid up, and this, the legislature had the power and authority to do. The statute makes no distinction between foreign and domestic corporations, and it is well settled that a foreign corporation cannot complain that it is subject to the same law applicable to and governing domestic corporations. The extent of the tax imposed is entirely within the discretion of the taxing power. The following authorities seem to be conclusive on the above propositions: *Phoenix Carpet Co. v. State*, 118 Ala. 43; *Horn Silver Mining Co. v. People*, 143 U. S. 305; *Home Ins. Co. v. People*, 134 U. S. 594.

On the unpaid license tax interest was recoverable. Code, § 4008.

The court in rendering judgment allowed the defendant credit for the seventy-five dollars paid by the defendant for each of the years 1900 and 1901. The facts, therefore, do not sustain the assignment of error, as to a failure to give this credit.

We find no error in the record, and the judgment must be affirmed.

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Bill in Equity for Equitable Assignment and Subrogation.

1. *Equitable assignment and subrogation; when shown to exist.*

Where one who, though having no previous interest and being under no obligation, pays off a mortgage or advances money for its payment at the instance of the mortgagor, and for his benefit, such person is in no true sense a stranger and volunteer, but is, under the doctrine of equitable assignment, entitled to be subrogated to the lien of said mortgage for the reimbursement of the amount paid thereon.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. WILLIAM L. PARKS.

The bill in this case was filed by the appellant, M. E. Motes, against the appellees, Dick Roberson and Mary J. Roberson, his wife, for the purpose of having a mortgage executed by the defendants to the Edinburgh American Land Mortgage Company and another mortgage executed by the defendants to the Loan Company of Alabama, equitably assigned to the complainant, and at the same time praying that the complainant be subrogated to the lien of said mortgages.

It is alleged in the bill that she, "at the request" of defendant "paid for him, or advanced to him to be paid on his past due payments on said mortgage debts and which were so paid."

The bill further alleges that "said sums paid or advanced to be paid on said mortgages have never been repaid or returned to complainant and that they are justly due with the interest thereon; that on the 31st day of August, 1897, complainant recovered a judgment against defendant Dick Roberson on a promissory note bearing date January 28, 1891, given for the aforesaid amounts or sums paid or advanced on said mortgage debts and for other and different uses, all amount-

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ing to \$600." It is further alleged that at the time complainants made the payments for Dick Roberson, or advanced to him the money for that purpose, that he was indebted to complainant in a large amount for advances and plantation supplies to enable him to make his crops and had been since the years 1888 to 1892, and a foreclosure of said mortgage would have taken from Dick Roberson the means of meeting his obligations to complainant, and added greatly to the peril of complainant as to all debts due her.

The defendants demurred to the bill and made a motion to dismiss it for the want of equity. Upon the submission of the cause upon the demurrer and the motion to dismiss, the chancellor rendered a decree sustaining the motion to dismiss. From this decree the complainant appeals, and assigns 'the rendition thereof as error.

J. R. MOTES, for appellant, cited *Millholland v. Tiffany*, 64 Md. 455; *Yaple v. Stephens*, 35 Kan. 680; *Roberson v. Mowell*, 66 Md. 530; *Tolman v. Smith*, 55 Cal. 280; *Sheldon on Subrogation*, 21, 31, 371; 5 General Digest, p. 1740, § 26; 6 *Ib.* p. 1951, § 15; 7 *Ib.* p. 1844, § 26; 9 *Ib.* p. 4236, § 1; *Faulk v. Calloway*, 123 Ala. 325.

A. C. WORTHY, *contra*, cited *Sheldon on Subrogation*, 4, § 3; *Simmons v. Walker*, 18 Ala. 664; *Jones v. Lockard*, 89 Ala. 575; *Fry v. Hamner*, 50 Ala. 52; *Pettus v. McKiuney*, 74 Ala. 108.

McCLELLAN, C. J.—It is laid down by Mr. Pomeroy that "The doctrine [of equitable assignment] is also justly extended, by analogy, to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his benefit, such person is in no true sense a mere stranger and volunteer." The doctrine thus stated has recently been approved and applied by this court, (*Faulk et al. v. Calloway*, 123 Ala. 325); and it is believed not to be inconsistent with any of our previous adjudications.

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Applying it to the facts averred in the present bill, the conclusion must be that the bill presents a case for equitable relief by way of subrogation to the lien of the mortgage given by Dick Roberson to the Mortgage Company for the reimbursement of complainant in respect of the sums she paid, directly or indirectly, at his instance and request on the mortgage debt. Our conclusion is, therefore, that the chancellor erred in dismissing the bill for want of equity.

Reversed and remanded.

Alabama Mutual Fire Insurance Co. v. Minchener.

Action upon Fire Insurance Policy.

1. *Action upon insurance policy; admissibility of evidence.*—When an insured, who has contracted for insurance, informs the agent of the insurance company who is authorized to issue the policy, of his desire to take out a policy of fire insurance upon a house and points out to such agent which house it is, and the agent, in describing the house insured in the policy, makes it uncertain which house is included therein, in an action upon said policy, it is competent for the insured to testify as to whether or not he pointed out to the agent the house that was burned as the one which was to be insured and told him that that was the house upon which he wished the insurance.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

This was an action brought by the appellee against the appellant; and counted upon a fire insurance policy. The defendant pleaded the general issue.

The policy of insurance described the property insured as "the one story shingle roof frame building and adjoining communicating additions thereto, including foundations, which is occupied as a dwelling house, and

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situated on the east side of Minchener street, in Troy, Alabama."

It was shown that the duly constituted general agent of the defendant company, with authority to make contracts for the company and issue policies of insurance at Troy, Alabama, duly executed and delivered to plaintiff he policy sued on, on the day of its date, for which he was paid the premium; that on the date of the issuance of the policy, the plaintiff was the owner of the property insured, which was known as the C. W. Williams place; that no written application was made by plaintiff for insurance thereon, but it was described by the plaintiff to the agent by pointing it out and showing it to him.

The plaintiff testified that the house was on a street in the city of Troy, on the east side of his, the plaintiff's, mill in said city, which street he had heard called by the name of Lake street and also by the name of Minchener street, and was most commonly called Lake street; that plaintiff had nothing to do with the description of the property further than to point it out to the agent, who was present and saw it and who wrote out the description of the property as it appears in the policy and handed it to the plaintiff, who retained it, not knowing the particular description employed, until the fire occurred. It was further shown that plaintiff had, therefore, had his lands in Troy surveyed and a map made of them which he filed and had recorded in the probate office of said county of Pike, in all respects according to the statute; and according to said map, the lot on which the C. W. Williams house is located—said house being the one insured and destroyed by fire—is located on Lake street; that according to said map, there is a Minchener street in said city which lies east of Lake street, and plaintiff owned a house on the east side of that street of the value of about \$250, while the value of the one destroyed by fire was shown to be \$600.

There was no controversy, as the bill of exceptions states, of the right of plaintiff to recover, if he is allowed to show that the Williams house was the one insured and intended to be insured by plaintiff and defendant's agent.

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The court, at the request of plaintiff, gave the general affirmative charge in its behalf. To the giving of this charge the defendant duly excepted, and also excepted to the court's refusal to give the general affirmative charge requested by it.

There were verdict and judgment for the plaintiff. Defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved, and the rulings of the court upon the charges asked.

FOSTER, SAMFORD & CARROLL, for appellant, cited *May on Insurance*, § 173; *Russell v. Russell*, 64 Ala. 500; *Mobile L. I. Co. v. Pruett*, 74 Ala. 497; *Insurance Co. v. Mowry*, 96 U. S. 547; *Thompson v. Ins. Co.*, 104 U. S. 259; 24 U. S. Rep. (L. C. P. ed.), 674; *Chambers v. Ringstaff*, 69 Ala. 144; *Gaston v. Weir*, 84 Ala. 196.

E. R. BRANNEN, *contra*, cited *Un. Mut. L. I. Co. v. Wilkinson*, 13 Wall. 231; *Amer. Ins. Co. v. Mahone*, 21 Wall. 152; *Ala. G. L. Ins. Co. v. Garner*, 77 Ala. 210; *Williamson v. Ins. Asso.*, 84 Ala. 106; *Creed v. Sun F. Ins. Co.*, 101 Ala. 522; *Amer. Cen. Ins. Co. v. McLanathan*, 11 Kan. 533; 1 *May on Insurance* (3d ed.), §§ 144-A.

HARALSON, J.—A policy of insurance should designate the property, so that the subject insured and the risk may be determined. In case of doubt as to what property is covered, the construction will be against the insurer.—2 *Joyce on Insurance*, § 1690.

Touching mistakes in the description of property insured, Mr. May observes that "knowledge of the company or its agents of the untruthfulness of the statements as to the distance of neighboring buildings, or of inaccuracy or incompleteness in the description of the property, at the time when the insurance is effected, by the general concurrence of the more recent decisions, will estop the insurers from setting up such untruthfulness in defense."—1 *May on Insurance*, § 262. Again, the same author states the rule of modern decisions to

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be, that "a party who deals with an agent, through whom he applies for and obtains a policy, has a right to presume that such material facts as are made known to him, are known to the principal, and when policies are issued with a full knowledge of such facts, the insured is to suffer no prejudice, nor are the insurers to gain any advantage by insisting upon conditions which it would be dishonest to enforce."—§ 498.

In case of the insurance of a ship, which is as applicable to a house, it is said: "If both parties have in view the same vessel, and the underwriter, when the policy is issued, knows its true name, and it is intended to insure that particular ship, a mistake in the name of the vessel would not prevent a recovery for its loss, there being no fraud or concealment, and the contract being otherwise valid and complete."—2 Joyce on Ins., § 1445; *Hughes v. Mercantile Ins. Co.*, 55 N. Y. 265.

In *James Rivers Ins. Co. v. Merritt & Robertson*, 47 Ala. 387, the plaintiffs stated verbally to defendant's agent that they desired insurance on their saw mill and machinery, and told him where it was. The agent visited it for the purpose of examination and inspected it to his satisfaction, and afterwards wrote the application which the plaintiffs made. A loss occurred, and on suit for its recovery, the company defended on the ground that the insurance was obtained on the written application of plaintiffs, and there was a misrepresentation or concealment of the presence of a planing machine in the building insured, which was not included in the property insured. The court said that the agent visited the saw-mill for the purpose of examination, and inspected it to his satisfaction. He saw the planing machine, and made inquiries about it. Afterwards, he wrote the application which the plaintiffs made. He insured other planing mills at the same rate. Upon this evidence the court held, that there was no error in a charge which instructed the jury that if defendant's agent wrote the application and did so in such form as to include the planing mill, and such was the intention of the plaintiff, Robertson, and the agent, then the defendant was liable for the insurance on the machinery including the planing mill.

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On the examination of the insured, he was asked to "state whether or not this house known as the Williams place, on the east side of said street mentioned by you (most commonly called Lake street, and which was called also, Minchener street), was the house which you pointed out to the agent of defendant company, and told him this was the property you wanted him to insure?" This question was objected to for that it called for illegal, irrelevant and immaterial evidence, and more especially, because the policy itself was the best evidence of what house was intended to be insured, and because the evidence called for tended to prove the intention of the parties. The court allowed the witness to answer, that he pointed out said Williams house to the agent, and told him he wanted a policy of insurance on that house. There was no error in the admission of this evidence. It tended to show, which it was competent to do, that this particular house and no other, was the one the agent insured. If there was any indefiniteness or uncertainty in the description, it was the act of defendant's agent, and this evidence made the matter plain.—*Guilmartin v. Wood*, 76 Ala. 209; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176; *Pope v. Glens Falls Ins. Co.*, 130 Ala. 356.

For the same reason, there was no error in allowing the witness, against the objection of defendant, to answer in the affirmative, the question, "Whether or not you and the said Joseph Minchener, Jr., as the agent of defendant, then and there agreed upon and contracted for a \$400 policy on said building and appurtenances, which policy was to run and be in force for three years from that date, and which was to be issued to you in said company, and which was subsequently issued to you, and which is the policy sued on in this case?"

There was no conflict in the evidence and it was conceded that there was no controversy as to the right of the plaintiff to recover, if he was allowed to show that the Williams house was the one intended by him and defendant's agent to be insured.

The judgment below must be affirmed.

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Action on Fire Insurance Policy.

1. *Insurance; arbitration clause; result of refusal to comply with provisions by one of the parties.*—Where in a policy of fire insurance, there is contained a provision for arbitration of the amount of the loss in the event of a disagreement as to such amount, if either party, after a disagreement as to the amount of the loss and a request by the other party for arbitration, in bad faith prevent such ascertainment by arbitration by refusing to proceed therewith, or by insisting upon the selection of improper arbitrators, or by undue interference with them after their selection, the other party is thereby absolved from further obligation to arbitrate; and if such fault be attributable to the insured it is a defense to the action on the policy, but if to the insurer, the lack of an award is not available to defeat a recovery on such policy.
2. *Same; same; same.*—Where the arbitration clause in a policy of fire insurance provides that in the event of a disagreement as to the amount of the loss, the amount of the loss should be ascertained by arbitration, and that the arbitrators should each be "competent and disinterested," if, under the agreement for submission to arbitration under such clause the arbitrator named by the insurer is not disinterested and this fact is known to the insurer, but unknown to the insured, the latter is not bound by the agreement to arbitrate, although the selection of such interested or partial arbitrator was agreed to by him; and under such circumstances the insurer is at liberty to prosecute a suit upon the policy of insurance and the agreement of submission to arbitrate presents no defense to the action.
3. *Same; same; general affirmative charge.*—Where in an action on a fire insurance policy which contained a provision for arbitration in the event of disagreement as to the amount of the loss, it is shown that the insured and insurer, upon disagreeing as to the amount of the loss, agreed to a submission to arbitration as provided by said clause, and that each selected an appraiser, who, together selected an umpire as provided for, but there was evidence tending to show that the appraiser selected by the insurer was not disinterested, but had been

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employed by the insurer in many such cases and manifested an unusual interest in behalf of the insurer, showing a bias in its behalf, it is error to give, in such suit, the general affirmative charge, requested by the defendant.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

This action was brought by the appellants, Hall & Brother against the Western Assurance Company of Toronto, and counted in the statutory form upon a fire insurance policy, seeking to recover the loss sustained by fire of said articles included in the policy. The defendant pleaded the general issue and several special pleas setting up a violation on the part of the plaintiffs of the arbitration clause contained in the policy of insurance which provided for arbitration in the event of a disagreement between the insurer and insured as to the value of the property destroyed, in that after the plaintiffs and the defendant had agreed upon an arbitration, and had selected arbitrators who, in accordance with said arbitration clause selected an umpire, the plaintiffs declined to proceed with the arbitration, and caused the arbitrators selected by them to refuse to take part in such arbitration.

The arbitration clause referred to is set out in the report of this case on the former appeals, and is found in 120 Ala. 547, and 112 Ala. 318, and special reference is here made to the reports of the case as set forth in said appeals. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion.

The court at the request of the defendant, gave the general affirmative charge in its behalf, and to the giving of this charge the defendant duly excepted.

There were verdict and judgment for the defendant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

COOPER & FOSTER, for appellants, cited *Western Assur. Co. v. Hall*, 120 Ala. 547; *Harrison v. Ger. Amer. Ins. Co.*, 67 Fed. Rep. 577; *Hamilton v. Home*

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Ins. Co., 137 U. S. 370; *Conn. Fire Ins. Co. v. Hamilton*, 59 Fed. Rep. 258; *Brock v. Dwelling House Ins. Co.*, 47 Amer. St. Rep. 562; *Hickerson v. Ins. Co.*, 32 L. R. A. 172; 2 Amer. & Eng. Ency. of Law, (2d ed.), 634; 2 Beach on Receivers, § 1256.

JOHN LONDON and R. W. WALKER, *contra*, cited 3 Ency. of Pl. & Pr., 433; *Harmon v. Chandler*, 3 Iowa, 152; *Western Assur. Co. v. Hall*, 120 Ala. 547; s. c. 112 Ala. 318.

TYSON, J.—The two opinions in this case, on former appeal, settle the question of the binding efficacy of the “arbitration clause, contained in the policy sued on.”—*Western Assurance Co. v. Hall*, 112 Ala. 318; *Id.* 120 Ala. 547. Pursuant to this provision of the policy, a written agreement for submission to two certain named appraisers, to estimate the loss upon specified items of property, about which the parties disagreed, was entered into by them. Under this agreement the two appraisers were to select a third, who should act with them in matters of difference *only*; and their award was to be binding upon the parties.

The policy in express terms prescribes the qualifications of the members of the board of arbitration. It requires each of them to be “competent and disinterested.” It is of no consequence that one was to be “selected” by each of the parties. The naming of a person to act as appraiser by one of the parties, was not a selection, until the other had agreed to accept him. The purpose of the clause is to secure a fair and impartial tribunal to settle the differences submitted to them. In their selection it is not contemplated that they shall represent either party to the controversy or be a partisan in the cause of either, nor is an appraiser expected to sustain the views or to further the interest of the party who may have named him. And this is true, not only with respect to estimating the amount of the loss, but also with reference to the selection of an umpire. They are to act in a *quasi* judicial capacity and as a court selected by the parties free from all partiality and bias in favor of either party, so as to do equal jus-

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tice between them. This tribunal having been selected to act instead of the court and in the place of the court, must, like a court, be impartial and non-partisan. For the term "*disinterested*" "does not mean simply lack of pecuniary interest, but requires the appraiser to be not biased or prejudiced." And if this provision of the policy was not carried out in this spirit and for this purpose, neither party is precluded from going to the courts, notwithstanding the agreement to submit their differences to the board of appraisers. In other words, if it be true that the appraiser named by defendant, although his selection was agreed to by the plaintiffs, was not disinterested and this was known to defendant but unknown to the plaintiffs at the time of entering into the agreement of submission, they are not bound by the agreement to arbitrate, and are at liberty to prosecute this suit. This would be a fraud upon the plaintiffs, and the agreement of submission to the appraiser is no defense to this suit.—*Hickerson v. Royal Ins. Co.*, 32 L. R. A. 172; *Brock v. Dwelling House Ins. Co.*, 47 Am. St. Rep. 562; *Bradshaw v. Agricultural Ins. Co.*, 32 N. E. Rep. 1055.

Pleas number 3 and 5 as amended and 7 of the defendant practically and substantially presented this issue. It is true replications numbered 2 and 3 to pleas 5 as amended and 7, also tendered this issue. But they were eliminated by demurrer, which ruling is assigned as error, but it is unnecessary to pass upon the correctness of it, since substantially the same issue of facts was tendered by the pleas. It is doubtless true that the burden of proof, under the issue made by these pleas, was upon the plaintiffs. The agreement to arbitrate having been executed for the purpose of carrying out the "arbitration clause" in the policy, in the absence of evidence tending to show that LaCoste, the appraiser named by defendant, was not disinterested, it would be presumed that he possessed the qualifications required of him. It may be well to say here that these pleas present the vital issue in the case. It is true there were two other special pleas filed in the cause, upon which issue was taken, but there is not the slightest evidence to sup-

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port either of them. The other plea, which was the general issue, only put the plaintiffs to proof of loss by fire of the property covered by the policy and the extent of the damage sustained, which they made.

The affirmative charge having been given at the request of the defendant, we must determine whether the evidence introduced was sufficient to authorize the submission to the jury of the question of LaCoste's disqualification, and if sufficient for that purpose, whether it was sufficient to authorize a submission to the jury of the question of fraud in his selection. LaCoste is shown not to have been a resident of Huntsville, when the loss occurred, but of Birmingham. On the next day after his selection, he appeared in Huntsville, was met at the hotel by Adams, the representative of the defendant, who made the agreement for submission for it and named LaCoste as an appraiser. He was then told by Adams that the first thing to be done is the appointment of an umpire and that he must appoint Myers, who had frequently acted for insurance companies and was a good man for them. He secured the selection of Myers as umpire. After doing so, he instituted a search for Myers, and failing to find him at his place of business, he went to his home, at night, where he spent more than an hour. He said to White, the other appraiser, "We don't want to be in too big a hurry about this thing, as I get ten dollars a day and my expenses out of these insurance companies." He made an effort to have White displaced and have some one from St. Louis or Chicago to take his place on the board. His conduct was such as to cause White to decline further to act with him. In a letter written by these plaintiffs to Adams, the fact is stated that LaCoste had been repeatedly employed by the defendant and paid by it, which was never denied. Without attempting to draw any inferences from these facts, which are undisputed, it is clear to us that the disinterestedness *vel non* of LaCoste, was a question for the jury. So, too, we are of the opinion, that whether the defendant knew of his disqualification and whether the plaintiffs also knew of it should, under the evidence, be sub-

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mitted to the jury. For if the defendant knew of it and concealed that fact, and the plaintiffs had no knowledge of it, this would amount to a fraud, which would absolve the plaintiffs of all obligations under the agreement entered into by them to submit the differences between them and defendant to the board of which he was a member. Fraud may be perpetrated by the intentional concealment of a material fact as well as by the misrepresentation of a material fact, if relied on and ignorantly acted upon by the other party to his injury, where a duty is upon the party possessing the knowledge to disclose the fact.—*Van Arsdale & Co. v. Howard*, 5 Ala. 596; *Griel v. Lomas*, 89 Ala. 420, and authorities there cited. When the defendant assumed to act under the terms of the arbitration clause in the policy, the obligation was upon it to name as an appraiser to be selected, a “competent and disinterested” person. This duty it owed to the plaintiffs and the plaintiffs had a right to rely upon its fulfilment of this obligation. If, instead of naming a qualified person, it named and secured the selection of LaCoste, knowing that he was not disinterested, but would be a partisan in its behalf, and the plaintiff was ignorant of these facts, this would be a fraud which would vitiate the agreement.

Reversed and remanded.

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Bill in Equity for Injunction and Cancellation of Mortgage.

1. *Mortgage to secure advances of money paid for mortgagor; when modification binding.*—Where the surety on a bond executes a note and mortgage to his co-surety for the purpose of securing the latter, in the payment of one-half of a designated amount to be paid by him in effecting the compromise of a judgment rendered against them, and the plaintiff in said judgment declines to accept said amount, it is competent for

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the mortgagor and mortgagee to modify the agreement so as to change the application of the money provided for by the note and mortgage; and upon the mortgagee subsequently effecting a compromise of said judgment by paying a larger amount than the sum stipulated in said mortgage, which was done with the mortgagor's consent and approval, said note and mortgage constitute a valid and binding obligation, and the consideration therefor did not fail and the mortgage thereby become extinguished when the first offer of compromise was rejected and the sum returned to the mortgagee.

APPEAL from the Chancery Court of Morgan.

Heard before the Hon. WILLIAM H. SIMPSON.

The bill in this case was filed by the appellant, Charles C. Sheats, against H. B. Scott. It was averred in the bill that at the April term, 1896, of the United States Court, a judgment was rendered against the complainant and the defendant and others, as sureties on the official bond of one Olmstead, as postmaster at New Decatur, in favor of the United States for \$3,362.31; that on April 25, 1898, the complainant executed a note to the defendant for \$250, and secured the same by a mortgage upon certain real estate; that said note and mortgage were executed to secure the defendant for advancing for complainant the sum of \$250 to be used in an effort to compromise the judgment which the United States had recovered against the sureties on said Olmstead's bond; that on April 28, 1898, the defendant, the said H. B. Scott, on behalf of himself and the other said sureties, submitted a proposition to the United States authorities to compromise said judgment by paying \$500 and deposited in a bank, which was designated as the government's depository, the \$500, besides the costs of the suit, \$250 of which was for the complainant, and \$250 was for the defendant, which was furnished or advanced by the defendant Scott on the note and mortgage which the complainant had executed to him for that purpose; that this proposition of compromise was declined and rejected, and the money that had been deposited for the purpose of effecting the compromise was ordered to be returned to the parties, and was returned to the defendant.

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It was then averred in the bill that by reason of the money to secure which said note and mortgage was executed having been returned to the defendant, there was a total failure of consideration to support the same, but that notwithstanding this fact the said defendant was threatening to foreclose the mortgage under the power contained therein, had advertised the property for sale, and unless restrained would sell said property.

The prayer of the bill was that an injunction be issued restraining the defendant from selling the lands conveyed in the mortgage, and that the defendant be required to surrender said note and mortgage and the same be cancelled and held for naught.

The defendant filed an answer to the bill and admitted that the facts stated therein were substantially true, but alleged that they were not all the facts relating to the transaction. He then averred in his answer that the complainant was indebted and his property heavily encumbered; that after the recovery of the judgment against the complainant and the defendant as sureties, it was agreed between the complainant and the defendant that the latter should take an active part in adjusting the compromise and that in accordance with this agreement, the plaintiff executed the note and mortgage for \$250, in order to enable the defendant to raise that much money as the complainant's part and contribution of the proposition of compromise; that the defendant in accordance with said agreement obtained on said note and mortgage \$250 which he procured to pay the agreed part of the complainant in the proposed compromise; that the first proposition of compromise was declined by the government authorities and one or two propositions of compromise were made by the defendant but were rejected; that finally the defendant received notice that the United States government would compromise the judgment for \$1,000, and that this proposition was accepted by the defendant; that the complainant Sheats was kept advised of the various steps and negotiations for the compromise and approved of them; that he agreed to pay all the interest which the defendant was bound to pay in order to carry the

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loan, based on the note and mortgage; that Sheats knew of every step taken and heartily concurred therein, and agreed with the defendant that the mortgage he had given should stand as security for said \$250 which was to be used by the defendant in said settlement; that said \$250 raised by the defendant on the note and mortgage executed by Sheats was used by him in effecting the compromise by the payment of the \$1,000; that Sheats pleaded his poverty, and stated to the defendant that he was unable to pay more than \$250; that since the advertisement of the property by the defendant for sale under the power contained in the mortgage, the complainant had stated to the defendant that he would raise the money and satisfy the claim, interest and costs. Under the opinion on the present appeal, it is unnecessary to set out in detail the facts in the case.

On the final submission of the cause on the pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed for, and ordered the bill dismissed. From this decree the complainant appeals, and assigns the rendition thereof as error.

HARRIS & EYSTER, for appellants, cited *Bray v. Comer*, 82 Ala. 183; *Wilkerson v. Tillman*, 66 Ala. 532; 1 Jones on Mortgages, § 360; *Gregg v. Banks*, 59 Ala. 311.

E. W. GODBEY, *contra*, cited 11 Amer. & Eng. Ency. of Law, (2d ed.), 162; *Railway Co. v. Attalla*, 118 Ala. 362; *McQuiddy v. Ware*, 20 Wall. 14; *Kentucky Wagon Co. v. Railway Co.*, 36 L. R. A. 855; *Meadors v. Askew*, 56 Ala. 583; *Owen v. Moore*, 14 Ala. 645; *Pierce v. Hunter*, 73 Miss. 754.

SHARPE, J.—From the pleadings and evidence it appears that the consideration upon which the note and mortgage in question were given, was an agreement on defendant's part to pay for complainant one-half of a total of \$500 in case an offer of that sum was accepted in compromise of a judgment held by the government against them and others as sureties on a postmaster's bond. Defendant offered the \$500 by placing it in bank at the disposal of the government, but the offer

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was declined and the money returned to him. Some months later he made a similar offer and deposit of \$500 and of \$62 additional to cover costs of the suit, but it was not accepted, and the sum deposited was refunded to him. After a year from the date of the note and mortgage and after they matured, he effected a compromise by paying \$1,062 in settlement of the judgment.

Whether defendant was entitled to treat \$250 of the sum he expended in the settlement as a sum secured by the mortgage has been the chiefly disputed question. It is not questioned that the preliminary agreement and defendant's undertaking to supply money was a sufficient consideration to uphold the note and mortgage originally, but complainant insists that the substantial consideration failed when the offer of \$500 was rejected and that sum was returned to defendant, and that thereby the mortgage became extinguished.

It is immaterial that evidence was not directed to showing complainant's interest in the mortgaged property. Defendant by claiming it solely through complainant under the mortgage, is held to admit he has an interest.—*Sullivan v. McLaughlin*, 99 Ala. 69; *Lang v. Wilkinson*, 57 Ala. 259; *Bernheim v. Horton*, 103 Ala. 380; *Pollard v. Cocke*, 19 Ala. 188.

The original contract having only provided for a compromise at \$500 had not effect to either bind or authorize defendant to commit the complainant to a borrowing of money to pay on a compromise at more than that sum. Though the increase of expenditure involved was borne immediately by defendant the change in amount was not immaterial to complainant; for in the absence of a release from the contribution which the law compels as between sureties, such change involved an increased liability on complainant for contribution.

It was, however, within the competency of the parties to modify the agreement so as to change the application of the money provided for by the note and mortgage by having it paid on the settlement as finally made. To have done so would not have been an attempt to substitute a different debt for the one secured, or a

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new consideration for one that had failed, for before the money was actually paid to the government the debt intended to be contracted and secured, could not under the contract have come into existence.

As to whether there was such a modification the evidence is in conflict. By a majority of the court this question of fact is determined in favor of the defendant, and in consequence the decree will be affirmed.

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Bill to Set Aside Fraudulent Conveyances and for Accounting.

1. *Fraudulent conveyance; burden of proof.*—In an action by an existing creditor to set aside a conveyance as fraudulent, the burden of proof is on the complaining creditor to show the existence of his debt; but the existence of the debt being shown and the conveyances being admitted, the burden of proof is on the grantee in the conveyance to show the *bona fides* of the transaction.
2. *Debtor and creditor; principal and agent; compensation of agent, when excessive.*—Where the amount of the income in the way of rents from certain plantations was about twenty-five hundred dollars, a charge of two thousand dollars for a year's services rendered by an agent in letting out and collecting the rents and looking after the repairs on said plantations, and visiting the plantations three or four times during the year, is excessive; three hundred dollars being a fair and reasonable compensation therefor.
3. *Fraudulent conveyance; transactions between relatives; bona fides.*—In determining the *bona fides* of a transaction assailed as fraudulent the fact that such transaction was had between parties nearly related is a circumstance which naturally calls for closer scrutiny than where the transaction is between strangers.
4. *Fraudulent conveyance; several conveyances to different grantees, how treated; common fraudulent purpose.*—Although conveyances are separate, covering different property, and executed on different dates to several grantees (all brothers

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of the grantor), yet, if made in pursuance of a purpose common to the grantor and the grantees to defraud the grantor's creditors, they will be regarded and treated as a single transaction, and any fact that would vitiate any one of said conveyances will be visited upon all.

5. *Fraudulent conveyance; law governing prior to enactment of present statute (Code, 1896, § 2158.)*—Although, prior to the enactment of section 2158 of the Code of 1896, a debtor in failing circumstances or insolvent, had the right to prefer one or more of his creditors over others to the extent of conveying his entire estate, and defeating other creditors in the collection of their debts; yet, to support such conveyance, it must have been absolute and without the reservation of benefit to the grantor; the debt or demand must have been a pre-existing one; and the property conveyed, on a fair and reasonable valuation, and must not have unreasonably exceeded the debt.

6. *Same; when conveyance held fraudulent as to existing creditors.*

A bill filed in equity, for the purpose of having set aside several conveyances as being fraudulent, the following facts were shown: A merchant, being insolvent or in failing circumstances, in the space of forty days made several conveyances to different brothers of property amounting in the aggregate to about ten thousand dollars in value, and being substantially all his visible, tangible assets, outside of his exemptions; and where the grantees knew of the grantor's insolvency, and grantor and grantees were intimate as brothers, and had frequent interviews and conversations during the time covering the making of the transfers; and two of the grantees were at the time in the employment of the grantor, and another had his office in the store where the grantor carried on his merchandise business; and where the books of the grantor offered in evidence showed very suspicious irregularities as to the debts to his brothers and in the order in which they were made and contained a number of erasures; and where there was evidence tending to show that during the time covering the transactions the grantor transferred and sold to one of the grantees choses in action for a present cash consideration; and that the grantor subsequent to the alleged transfers was in the possession of choses in action, embraced in the conveyances, trying to collect same: *Held*: That the grantees and grantor had a common purpose to defraud; that the grantees had not discharged the burden of showing by clear and satisfactory proof the *bona fides* of the transactions assailed; and that the conveyances or transfers were fraudulent as to existing creditors.

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APPEAL from Limestone Chancery Court.

Heard before Hon. W. H. SIMPSON.

The bill in this case was filed by P. F. Garrett, as administrator of the estate of Eliza A. F. Lane, deceased, against E. J. Russell, J. M. Russell, W. B. Russell, George R. Russell and Thomas A. Russell.

The purpose of the bill and the facts of the case necessary to an understanding of the decision on the present appeal are sufficiently shown in the opinion.

Pending the suit said P. F. Garrett died, and the cause was revived in the name of John H. Davis, as administrator *de bonis non* of the estate of Eliza A. F. Lane, deceased.

Upon the submission of the cause on the pleadings and proof, the chancellor granted the relief prayed for. From this decree the respondents appeal.

HUMES, SHEFFEY & SPEAKE and W. R. FRANCIS, for appellants, cited *Rankin & Co. v. Vandiver*, 78 Ala. 562; *Dickson v. Higgins*, 82 Ala. 264; *Levy v. Williams*, 79 Ala. 171; *Hodges v. Coleman*, 76 Ala. 103; *Carter Bros. & Co. v. Coleman*, 84 Ala. 256; *Harris v. Russell*, 93 Ala. 59; *Harrison v. Johnson*, 27 Ala. 445; *Moses Bros. v. Noble*, 86 Ala. 417; *Golden v. Connor*, 89 Ala. 598; *Lathrop Hatten Co. v. Bessemer Savings Bank*, 96 Ala. 350; *Moore, Marsh & Co. v. Penn*, 95 Ala. 200; *Buford v. Shannon*, 95 Ala. 205; *Ziegler v. Carter*, 94 Ala. 291; *Brinston v. Edwards*, 94 Ala. 447; *First Nat. Bank v. Smith*, 93 Ala. 97; *Hannon v. McRae*, 91 Ala. 401; *Dollins v. Pollak*, 89 Ala. 352; *Crawford v. Kirksey*, 55 Ala. 282; *Montgomery v. Bayliss*, 96 Ala. 172; *Chipman v. Stern*, 89 Ala. 207; *Knowles v. Street*, 87 Ala. 357; *Shealy v. Edwards*, 75 Ala. 411; *Boggs v. Edison Electric Illuminating Co.*, 96 Ala. 295; *Smith v. Collins*, 94 Ala. 304.

MCCLELLAN & MCCLELLAN and J. H. TURRENTINE, *contra*.—The conveyances attacked by the bill and sought to be set aside were fraudulent and void; it being shown that they were made for the purpose of hindering, delaying and defrauding the complainants and other credi-

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tors.—Bump Fraud. Conv., 69, 76, 77, 78, 79, 80, 81, 82, 92, 95, 96, 98, 553 to 566; Wait Fraud. Conv., §§ 3, 5, 6, 7, 8, 13, 225, 231, 233, 234, 235, 236, 239, 241; 242; 243, 272; *Thames v. Rembert*, 63 Ala. 561; *Harrell v. Mitchell*, 61 Ala. 270; *Pickett v. Pipkin*, 64 Ala. 520; *Gordon v. McIlwain*, 82 Ala. 250; *Smith v. Kaufman*, 100 Ala. 408; *Smith v. Kaufman*, 25 Ala. 161; *Sims v. Gains*, 64 Ala. 392; *Danner & Co. v. Brewer & Co.*, 69 Ala. 191; *Tryon v. Flournoy*, 80 Ala. 321; *Carter Bros. v. Coleman*, 82 Ala. 177; *Owens v. Hobbie*, 82 Ala. 466; *Smith v. Kaufman*, 100 Ala. 408; *Shealy & Finn v. Edwards*, 75 Ala. 411; *Lehman v. Kelly*, 68 Ala. 192.

The facts and circumstances as proven show that the brothers, with E. J. Russell, combined and formed a common and widespread conspiracy to "hinder, delay and defraud" his creditors, which they prosecuted and carried out with energy and vigor to a successful termination. Thus from day to day, from January 1 to February 7, 1882, there was an incessant, persistent and fierce alienation of E. J. Russell's property, mainly to his brothers, time for which was gained by every sort of subterfuge, deceitful pretense and crafty trick. The conspiracy being thus thoroughly established between all of the defendants by which, substantially, all his property was divested out of him by a series of conveyances to his brothers, then these conveyances, however numerous, will be treated as one transaction.—Wait on Fraud. Conv., 282; Bump on Fraud. Conv., 548; *Harris v. Russell*, 93 Ala. 59; *Perry Company v. Foster*, 58 Ala. 520; *Pickett v. Pipkin*, 64 Ala. 520; *Hinds v. Hinds*, 80 Ala. 225, 227.

But the brothers, the grantees, undertake to shield themselves under the much abused doctrine laid down first in this State in 73 Ala. 103, 120, now prohibited by statute, that a man, though insolvent or in failing circumstances, may lawfully give a preference among his *bona fide*, pre-existing creditors, by absolute sales of his property at a fair price to some of them to the exclusion of others, the intent in such case being immaterial, provided no benefit is reserved to himself.

In approaching this, as the other phase of the case,

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it will not be forgotten that the burden of proof is on the grantees; that the debts due the creditors being older than the sales, the sales are presumed to be void for fraud; that the consideration, the sales and the price of the property must be *bona fide*, fair and adequate; that such sales between the nearest kinsmen are looked on with the most jealous, suspicious and skeptical eyes, and if there is a single cloud, however small, resting over them, they must fall; that the protests of innocence, of good faith and of fairness by such grantees are of little if any weight when in conflict with the circumstances, the reason and natural order of things; that possession of the property, in such a case as this, must be promptly delivered to the grantees; that the declarations of each of the parties while still in the possession of the property, whether before or after the sales, are competent evidence against all of them, especially when a conspiracy among them is apparent; that such a case as this is usually made out from circumstances, great latitude for which is allowed, such transactions being hedged about, carried on under cover and rarely avowed; that all the badges and circumstances of fraud are as pertinent to the *bona fides* of the consideration, the good faith of the sales and the benefit reserved as to the intent, when it is material; that the subsequent dealings of the parties among themselves, the support of the grantor by the grantees and their conduct on former trials of the matters in controversy are all admissible; that vague, general and evasive answers to the bill or to questions by the parties are exceedingly suspicious; that the grantees must have the ability to purchase the property; that if either one of these sales, to either one of the grantees, is bad, all are bad; that neither of the grantees must go beyond his own safety or security, nor interfere with other creditors for the benefit of anybody; and that, after all, the transactions with the grantees cannot be sustained by anything less than "clear, convincing and satisfactory evidence." These various propositions are fully sustained in one or more of these authorities, if the court has any doubt about them: *Moog v. Barrow*, 101 Ala. 209; *Harris v. Russell*, 93 Ala. 50; *Pollak v. Searcy*, 84 Ala. 259; *Hubbard v. Allen*, 59 Ala. 283; *Harrell v.*

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Mitchell, 61 Ala. 270; *Crawford v. Kirksey*, 55 Ala. 282; *Carter Bros. v. Coleman*, 82 Ala. 177; *Buchanan v. Buchanan*, 72 Ala. 55; *Morrison v. Morris*, 85 Ala. 196; *Jaffrey v. McGough*, 83 Ala. 202; *Calhoun v. Hannan*, 87 Ala. 277; *Pickett v. Pipkin*, 64 Ala. 520; *Flournoy v. Lyon*, 70 Ala. 308; *Proskauer v. Banks*, 77 Ala. 257; *W. Un. Tel. Co. v. State Board*, 80 Ala. 275; 26 Am. St. Rep. 254, 257; 5 Am. St. Rep. 657; *Hall v. Heydon*, 41 Ala. 242; *Bump*, 90 to 98, 353, 354, 548, 560, 561; *Wait*, 5, 6, 7, 13, 242, 251 to 259, 255 to 257, 281, 282.

DOWDELL, J.—The present bill is that of a creditor against an insolvent debtor and for the purpose of setting aside certain conveyances made by the debtor as being fraudulent as to creditors, and in this connection to have an accounting by the debtor, E. J. Russell, with the complainant as the administrator of the estate of Eliza Lane, deceased. The equity of the bill was determined by this court on a former appeal from the decree of the chancellor overruling the demurrer to the bill.—*Russell v. Garrett*, 75 Ala. 348. The present appeal is taken from a final decree on a submission of the cause upon the pleadings and evidence. In this decree the chancellor without passing upon the numerous objections and exceptions to testimony on both sides, and after considering only the competent and legal evidence, as stated in his decree, determined that the complainant was entitled to the relief prayed for in the bill. By the decree the following facts also were specially ascertained from the evidence, viz.: That the respondent, E. J. Russell, was indebted to Eliza Lane at and before the time of the alleged fraudulent transfers, and to the complainant as the administrator of her estate, at the time of the filing of the bill; and that the transfers and conveyances made by the debtor from the first day of January to the 7th day of February, 1882, as alleged in the bill were fraudulent and void as to creditors, and, also, that the said E. J. Russell was insolvent at the time of the said alleged transfers and conveyances of his property. The decree then di-

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rected a reference to the register to ascertain the amount of the complainant's debt, and, also, the description and value of the property so transferred and conveyed, which the decree condemned for the satisfaction of said indebtedness.

The assignments of error go to the chancellor's conclusions as to the facts from the evidence.

The principles of law applicable to the present case are plain and practically free from difficulty; indeed, there is little or no controversy as to the law governing the main issues in the case. The testimony taken in the case is voluminous, covering over a thousand pages of the transcript. The objections and exceptions to evidence on both sides are numerous, and much of the same is subject to objection for being either illegal, incompetent, or irrelevant. We concur with the chancellor in the suggestion as to the time it would take to enter upon a discussion of the objections to the evidence; besides, it would extend this opinion into many pages without subserving any beneficial end. We have given the whole of this testimony a careful reading and after eliminating the illegal and considering that which is legal, will in dealing with the questions involved, undertake only to state our conclusions as to the facts drawn from the evidence.

The first question of fact presented for consideration is that of indebtedness from the respondent E. J. Russell to the complainant as administrator of the estate of Eliza Lane, deceased. The chancellor in his decree determined from the evidence the existence of an indebtedness, without ascertaining the amount, but referred the question of amount to the register. The appellants assign this finding of fact by the chancellor as error, insisting that on the evidence, the respondent E. J. Russell was and is a creditor of said estate and not a debtor. On this question of indebtedness the burden of proof was on the complainant. It is a conceded fact that the said E. J. Russell was the agent of the said Eliza Lane from some time in the early spring of 1881 until her death on May 16th, 1882, in letting out and collecting the rent on several plantations in the county

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of Limestone, and looking after the repairs on said plantations, and, also, in advancing supplies to tenants on the plantations enabling them to grow crops on the same, on the credit and responsibility of Mrs. Lane, the said agent being at the time engaged in the business of a merchant in the town of Athens, and realizing the profits on such advances. The said E. J. Russell offered in evidence a statement of his account as such agent, with credits and debits, showing a balance in his favor of something over six hundred dollars. Without attempting to ascertain or show the amount of the said Russell's indebtedness, a matter to be hereafter determined under the decree of reference, we need only to advert to one item contained in said account and the evidence relating thereto to satisfy us of the correctness of the chancellor's finding of the fact of said Russell's indebtedness to said estate. In this account he credits himself with the sum of two thousand dollars for his services rendered as such agent. There is no pretense of any contract or agreement between him and his principal of any stipulated sum for his services. He simply claims the same as reasonable compensation for services rendered and offered evidence to that end. The great weight of the evidence, we think, satisfactorily and clearly shows that for the services actually rendered the claim was excessive, and that a fair and reasonable compensation would not exceed three hundred dollars. The amount of the income in the way of rents from these plantations being about twenty-five hundred dollars, a charge of two thousand dollars for services rendered, which consisted in the main of letting out the lands and collecting the rents and visiting the plantations three or four times during the year, is as shown by the evidence palpably an inequitable division of the proceeds by the agent with his principal. With this item of his account scaled to what would be fair and reasonable compensation for his services as agent as shown by the great weight of the evidence, the fact of his indebtedness to the complainant is put beyond doubt. But, in addition to this, there is the testimony of several disinterested witnesses to his

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admission of an indebtedness to the estate of Mrs. Lane, made by him in conversation with these witnesses at different times soon after the death of Mrs. Lane.

The next assignment of error in the decree, like the first, relates to the finding of a fact, viz., fraud in the transfers and conveyances of his property by the said E. J. Russell to his several brothers from the first of January up to and including the 7th day of February, following. The making of the several transfers and conveyances to his brothers by the said respondent E. J. assailed by the bill is not denied, but it is claimed by the respondents that these conveyances and transfers of his property were made in good faith and in payment of a pre-existing indebtedness of the said E. J. to each of the several grantees. The existence of a debt to the complaining creditor being shown, the conveyances by the debtor being admitted, the burden of proof is upon the grantees in the conveyances assailed as fraudulent, to show the *bona fides* of the transactions. This proposition of law is too familiar to require elaboration in argument, and as for authorities we content ourselves by referring to those cited in brief of appellee's counsel.

That the respondent E. J. Russell was insolvent during the period of time from January 1st to February 7th, 1882, covering the conveyances attacked by the bill and held fraudulent by the chancellor, we think the evidence clearly establishes. Counsel for appellant concede in argument, that during this time he was being harassed by some of his creditors and was financially embarrassed. The grantees in the alleged fraudulent conveyances were the brothers of the grantor, the embarrassed and failing debtor, and that they knew of his insolvency, we think under the evidence, is beyond doubt. They were intimate as brothers, and had frequent interviews and consultations during the time covering the making of the alleged fraudulent transfers. Two of the brothers were at the time in the employment of the grantor, and another had his office in the store where the grantor carried on his merchandise business. In determining the *bona fides* of a trans-

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action assailed as fraudulent, the fact that such transaction was had between parties nearly related, is a circumstance which naturally calls for closer scrutiny than where the transaction is between strangers. In the present case the transfers of his property by the said E. J. Russell to his several brothers, when taken in the aggregate amounted to about ten thousand dollars, and, outside of his exemptions, embracing substantially all of his visible tangible assets. That it was the purpose of E. J. Russell in making these transfers of his property to hinder, delay, and defeat other creditors in the collection of their debts, we think the evidence establishes beyond question, and our conclusion from the evidence is, that his brothers, the grantees, shared in this purpose. The evidence, in our opinion, warranted the conclusion reached by the chancellor of the existence of a common purpose on the part of the debtor and the grantees respondents in the bill, to defeat the creditors of the said E. J. Russell, and such being the case the several conveyances, which were made in the months of January and February, 1882, though separate as to the several grantees and made at different times will be regarded and treated as a single transaction. And although the conveyances are separate, and executed on different dates, if done in pursuance of a purpose common to the grantor and the grantees to defraud, any fact that would vitiate any one of said conveyances as fraudulent, would be visited upon all. Throughout these transactions from the first of January to the 7th of February, on which latter date, the last of his visible assets consisting of his stock of merchandise in his Athens store was conveyed in bulk, the evidence discloses many circumstances denominated in the books as badges of fraud. But it is insisted that these transfers of his property by the debtor to the respective brothers, were made in satisfaction and payment of antecedent *bona fide* debts due and owing by him to the said grantees, and for that reason the conveyances should be upheld regardless of the intent or motive. At the time of the making of these conveyances, which was prior to the enactment of the present statute

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(Code, 1896, § 2158), a debtor though in failing circumstances or insolvent, had the right to prefer one or more of his creditors over others to the extent of conveying his entire estate, and to the end of defeating such other creditors in the collection of their debts. But even then to support such conveyance, the same must have been absolute, and without reservation of any benefit to the grantor; the debt or demand a *bona fide* pre-existing debt; the property conveyed, on a fair and reasonable valuation, not unreasonably excessive of the demand. On the other hand, if the conveyance was not absolute, or benefit reserved, or if the property conveyed was materially in excess of the demand, or if the debt was simulated or fictitious in whole or in part, or if the purchasing creditor gave in part any cash consideration in obtaining the conveyance, it rendered the same void as to other creditors. When tested by these principles, the burden resting upon the respondents to show by clear and satisfactory proof the *bona fides* of the transactions assailed, we are unable from all of the evidence to say that the burden has been discharged. As to the question of indebtedness to the respective grantees, in support of the testimony of the grantor and each of the grantees as to his particular debt, the books of the debtor grantor were offered in evidence to show the amount and that the debt was an antecedent debt. The entries in the debtor's books relative to the indebtedness showed very suspicious irregularities as to debts and in the order in which they were made, and also contained evidence of a number of erasures. This evidence tended very materially to weaken the testimony of the grantor and the grantees as to the *bona fide* existence of the alleged indebtedness. There is also other evidence which throws suspicion on the alleged claims of one or more of the grantees. There is likewise, evidence which shows a reservation to the grantor in the transfer of some of his assets, or a pretended and not an absolute transfer. The evidence shows the grantor subsequent to the alleged transfers in the possession of choses in action trying to collect the same. There is also evidence going to show during

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the time covering the transactions assailed in the bill transfer and sale by the debtor to one of the grantees of choses in action for a present cash consideration. Besides the circumstances adverted to above, there are others shown in the evidence relative to the actions, conduct, and statements by the said E. J. Russell and his said brothers, which taken in connection with what we have mentioned, go not only strongly to show a common design on the part of the grantor and grantees to defeat other creditors in the collection of their debts, but also to impeach the *bona fides* of the alleged indebtedness of the grantor to the several grantees. To say the least of it, the evidence of the respondents, in face of so many suspicious circumstances disclosed, falls short of that clear and satisfactory proof required under the law and necessary to satisfy a court of equity of that good faith in the transaction between persons so intimately and nearly related when assailed for a fraud. On account of the number of witnesses examined, the wide range taken in the testimony, and the voluminousness of the evidence, we have felt justified in this opinion in referring to it in a general way. And our conclusion from the whole evidence is, that the decree of the chancellor is free from error, and is here affirmed.

McCLELLAN, C. J., not sitting.

MEMORANDA

OF

CASES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, WHICH ARE ORDERED NOT TO BE
REPORTED IN FULL.

Vaughn v. Walker.

APPEAL from the Circuit Court of Lauderdale.
Tried before the Hon. E. B. ALMON.

SIMPSON & JONES and R. T. SIMPSON, for appellant.

JOHN T. ASHCRAFT, for appellee.

This was a suit by appellee against appellant, for damages claimed to have been suffered by trespassing stock, in contravention of the provisions of an act for the protection of plantations and crops within certain limits of Lauderdale county, (Acts of 1869-70, p. 9).

There were verdict and judgment for the plaintiff. The defendant appeals.

Reversed, rendered in part and remanded.

Opinion by McCLELLAN, C. J.

Marlowe v. State.

APPEAL from Circuit Court of Bullock.
Tried before the Hon. A. A. EVANS.

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

The appellant was indicted, tried and convicted for grand larceny.

The judgment of conviction is affirmed.

Opinion by HARALSON, J.

Anderson v. The State.

APPEAL from the Circuit Court of Covington.

Tried before the Hon. JOHN P. HUBBARD.

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

The appellant was indicted and tried for the murder of John McNeil, was convicted of murder in the first degree, and sentenced to the penitentiary for life.

The judgment of conviction is affirmed.

Opinion by TYSON, J.

Wells v. Smith.

APPEAL from Circuit Court of Jefferson.

Tried before the Hon. A. A. COLEMAN.

JOHN W. CHAMBLEE, for appellant.

CHARLES B. POWELL, for appellee.

This action was brought by the appellant against the appellee; and counted upon a promissory note.

From a judgment in favor of the defendant the plaintiff appeals.

The judgment is affirmed.

Opinion by DOWDELL, J.

Sowell v. The State.

APPEAL from the Circuit Court of Geneva.
Tried before the Hon. JOHN P. HUBBARD.

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

The appellant was indicted and tried for the murder of Lula Sowell; was convicted of murder in the second degree, and sentenced to the penitentiary for twenty years.

The judgment of conviction is affirmed.

Opinion PER CURIAM.

Helena Coal Co. v. Hays.

APPEAL from the Circuit Court of Shelby.
Tried before the Hon. JOHN PELHAM.

MCMILLAN & THETFORD, for appellant.

W. S. CARY, for appellee.

This action was brought against the appellant, to recover fees for medical services rendered defendant's employees.

From a judgment in favor of the plaintiff, the defendant appeals.

The judgment is reversed and the cause remanded.

Opinion by McCLELLAN, C. J.

Marlowe v. State.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. A. A. EVANS.

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

The appellant was indicted, tried and convicted for burglary.

The judgment of conviction is affirmed.

Opinion by HARALSON, J.

Hunt v. Matthews.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. J. A. BILBRO.

O. D. STREET, for appellant.

JOHN A. LUSK, for appellee.

This was an action of assumpsit, brought by the appellee against the appellant. There were verdict and judgment for the plaintiff, and the defendant appeals.

The only errors assigned are based upon the refusal of the court to give the several written charges requested by the defendant. The record does not show any refused charges that were requested by the defendant.

There being nothing to support the assignments of error, the judgment of the court is accordingly affirmed.

Opinion by DOWDELL, J.

Engram *v.* State.

APPEAL from the Circuit Court of Geneva.
Tried before the Hon. JOHN P. HUBBARD.

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

The appellant was indicted and tried for the murder of Lula Sowell; was convicted of murder in the second degree and sentenced to the penitentiary for fifteen years.

The judgment of conviction is affirmed.

Opinion PER CURIAM.

McCalley *v.* Ragland *et al.*

APPEAL from Probate Court of Madison.
Heard before the Hon. S. M. STEWART.

CHARLES J. STONE, for appellant.

HUMES, SHEFFEY & SPEAKE, for appellee.

The proceedings in this case were commenced by a petition made by Mary A. Ragland, as administratrix of the estate of Lewis Jones, deceased, for a final settlement of her account as such administratrix. The appeal is by the guardian *ad litem* of an infant party from a decree of the probate court rendered on final settlement.

The decree is affirmed.

Opinion by HARALSON, J.

Cherry v. The State.

APPEAL from the Circuit Court of Cherokee.
Tried before the Hon. J. A. BILBRO.

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

The appellant was indicted and tried and convicted for murder in the second degree, and sentenced to the penitentiary for ten years.

The judgment of conviction is affirmed.

Opinion PER CURIAM.

Spigner v. State.

APPEAL from the Circuit Court of Geneva.
Tried before the Hon. JOHN P. HUBBARD.

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

The appellant was indicted, tried and convicted for aiding a prisoner to escape.

The judgment of conviction is affirmed.

Opinion PER CURIAM.

**Alabama Mineral R. R. Co. v. Jones,
Admrx.**

APPEAL from the Circuit Court of Shelby.
Tried before the Hon. JOHN PELHAM.

THOS. G. & CHAS. P. JONES, for appellant.

BROWNE & LEEPER, for appellee.

This action was brought by Mary A. Jones, as administratrix of the estate of John Jones, deceased, against the Alabama Mineral Railroad Company, to recover damages for the alleged negligent killing of the plaintiff's intestate.

From a judgment in favor of the plaintiff, assessing her damages at \$2,000, the defendant prosecutes the present appeal. This is the fourth appeal in this case. The evidence on the trial, from which the present appeal is prosecuted, was substantially the same as upon the former trial.

The judgment is affirmed upon the authority of *Jones v. Ala. Min. R. R. Co.*, 107 Ala. 400; *Ala. Min. R. R. Co. v. Jones*, 114 Ala. 519; *Ala. Min. R. R. Co. v. Jones*, 121 Ala. 113.

Opinion by McCLELLAN, C. J.

Gillam v. Cumbee.

APPEAL from the Chancery Court of Tallapoosa.
Heard before the Hon. RICHARD B. KELLY.

W. M. LACKEY, J. A. TERRELL and H. J. GILLAM, for appellant.

THOS. L. BULGER, for appellee.

The bill of complaint was filed by the appellant against the appellees, and sought to have enforced the specific performance of a contract, alleged to have been entered into, providing for the execution of a deed, and to remove certain deeds as clouds upon complainant's title.

On the submission of the cause on the pleadings and proof, the chancellor decreed that the complainant was not entitled to the relief prayed for, and ordered the bill dismissed. From this decree complainant appeals, and assigns the rendition thereof as error.

Upon the original announcement of the case, the decree of the chancellor was affirmed. On application for rehearing, the judgment of affirmance theretofore rendered was set aside and judgment was rendered reversing the decree of the chancery court and granting the relief prayed for in the bill. Justice HARALSON dissents from the judgment rendered on the application for rehearing.

Opinion by HARALSON, J.

Borom et al. v. Posey et al.

APPEAL from the Circuit Court of Shelby.
Tried before the Hon. JOHN PELHAM.

PETERS & BEAVERS and SAMUEL HENDERSON, for appellant.

McMILLAN & THETFORD, for appellee.

The proceedings in this case were had upon a petition filed by the appellees, addressed to the judge of probate of Shelby county, praying that he set aside and vacate the decree formerly made by him establishing a stock law district in beat 10 of Shelby county.

From a decree annulling said former order, the appellant appealed to the circuit court. In the circuit court the decree of the probate court was affirmed. In the transcript on this appeal there appears in the bill of exceptions what purports to be and is there called a judgment. It cannot be looked to as such on this appeal. The judgment appealed from can only be presented to this court by a certified transcript of the *record* of the trial court. The transcript shows no judgment of record in the court below, but merely a statement of the judge in the bill of exceptions that a judgment was rendered and what that judgment was.

The appeal is dismissed.

Opinion by McCLELLAN, C. J.

Glover v. Samuel.

APPEAL from the Circuit Court of Marshall.
Tried before the Hon. J. A. BILBRO.

JOHN A. LUSK, for appellant.

O. D. STREET, for appellee.

This was an action for money had and received, brought by the appellee against the appellant. From a judgment in favor of the plaintiff defendant appeals. The judgment is reversed and the cause remanded.

Opinion by TYSON, J.

**National Building & Loan Asso. v.
McGauley.**

APPEAL from the Montgomery Chancery Court.
Heard before the Hon. WILLIAM L. PARKS.

WM. L. MARTIN and W. E. HOLLOWAY, for appellant.

GORDON MACDONALD, for appellee.

The bill in this case was filed by the appellee, Mrs. Kate McGauley, against the National Building & Loan Association, and sought the redemption under certain mortgages made by one Englehardt to the Building & Loan Association, conveying certain real estate which Englehardt had devised to the complainant, and for the appointment of a receiver of the defendant corporation. The defendant moved to dismiss the bill for want of equity and demurred to the bill upon several grounds. On the submission of the cause on this motion and demurrer, the court rendered a decree overruling the same. From this decree the defendant appeals, and assigns the rendition thereof as error.

Upon the authority of *Johnston v. Nat. B. & L. Asso.*, 125 Ala. 465, the decree of the chancellor is reversed and a decree is rendered in this court dismissing the bill without prejudice.

Reversed and rendered.

Opinion by McCLELLAN, C. J.

Bowen v. Chestnut.

APPEAL from the Jefferson Probate Court.
Heard before the Hon. J. P. STILES.

POWELL & BLACKBURN, for appellant.

BOWMAN, HARSH & BEDDOW, for appellee.

John Ludwig, a minor about 17 years old, died in October, 1900, in Jefferson county, Alabama. Shortly after his death, Thomas Chestnut filed his application to administer on the estate and in a few days thereafter A. C. Oxford filed his application; and thereafterwards, within forty days after the death of said Ludwig, Thomas A. Bowen filed his application for letters of administration. Chestnut and Bowen both based their claim and application on being the largest creditor of the intestate residing in Alabama. Oxford's application is based on being a friend of the brothers of deceased. Chestnut's application was resisted on the ground that he was not a creditor of the intestate, while Bowen's application was resisted mainly on the ground that he was not a resident of Alabama, and also that he was not a creditor of the intestate. The court decided that neither of the applicants were entitled to a preference over the other, but granted the application of Chestnut on the ground of being a fit and suitable person to administer on the estate and denied the application of Bowen. It is from this ruling and judgment of the court that this appeal is taken.

The judgment is affirmed.

Opinion by SHARPE, J.

Hereford v. The State.

APPEAL from the Circuit Court of Madison.
Tried before the Hon. O. KYLE.

No counsel marked as appearing for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

The appellant was indicted and tried for the murder of Sydney Pruitt, was convicted of murder in the first degree and sentenced to the penitentiary for life.

The bill of exceptions in this case was signed in vacation and after the expiration of the time fixed by the order of the court in term time. It has been a number of times held by this court in recent decisions that in such a case the bill of exceptions forms no part of the record, and can not, therefore, be looked to for any purpose.

The judgment of conviction is affirmed.

Opinion by DOWDELL, J.

Henderson *et al.* v. Horton.

APPEAL from the Chancery Court of Crenshaw.
Heard before the Hon. W. L. PARKS.

RUSHTON & POWELL, for appellants.

LANE & CRENSHAW, for appellee.

The appellee, by her bill of complaint in the court below, sought the cancellation of a deed of conveyance of lands, her statutory separate estate, made by her and her husband to J. D. Henderson, one of the appellants, on the ground that said deed, though in form an absolute deed of conveyance, was in fact a mortgage and made to secure a pre-existing debt due from her husband to the firm of J. D. & J. C. Henderson, and to get

an extension of time for the payment of the same.

On the submission of the cause upon the pleadings and proof, the chancellor rendered a decree granting the relief prayed for by the complainant.

The defendant appeals, and assigns as error the rendition of said decree.

Judgment affirmed.

Opinion by McCLELLAN, C. J.

Norwood & Co. v. Wood & Hattemer.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. J. C. RICHARDSON.

J. M. CHILTON, for appellants.

C. E. HAMILTON and WATTS, TROY & CAFFEY, for appellees.

This was an action on the case, brought by the appellees, Wood & Hattemer, against the appellants, Norwood & Company, to recover damages for the destruction of plaintiffs' lien on cotton.

From a judgment in favor of the plaintiffs, the defendants appeal, and assign as error the rulings of the trial court in sustaining the demurrers interposed by the plaintiffs to certain pleas filed by defendants.

The judgment is affirmed.

Opinion by HARALSON, J.

McAnulty v. State.

APPEAL from the Circuit Court of Henry.

Tried before the Hon. JOHN P. HUBBARD.

LEE & KOONCE, for appellant.

CHAS. G. BROWN, Attorney-General, for the State.

The appellant was indicted, tried and convicted for the violation of a local prohibition law.

The judgment is affirmed.

Opinion by DOWDELL, J.

Carroll v. Anderson.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN P. HUBBARD.

FOSTER, SAMFORD & CARROLL, for appellant.

E. R. BRANNEN, for appellee.

This suit was instituted by the appellant against the appellee to recover on an account and for money had and received, the value of a bale of cotton upon which plaintiff had a mortgage, and which defendant bought and sold and received the money therefor.

From a verdict in favor of the defendant the plaintiff appeals.

Judgment is affirmed.

Opinion by McCLELLAN, C. J.

Davis v. Taylor.

APPEAL from the Circuit Court of Lowndes.
Tried before the Hon. J. C. RICHARDSON.

LOMAX, CRUM & WEIL and CHAS. A. WHITTEN, for
appellant.

GORDON & MCGAUGH, for appellee.

This was an action of unlawful detainer, brought by
the appellant against the appellee.

From a judgment in favor of the defendant plaintiff
appeals.

The judgment is reversed and the cause remanded.

Opinion by HARALSON, J.

INDEX.

ACTION.

1. *Pleading and practice; actions ex delicto and ex contractu can not be joined.*—A complaint which contains a count in case, which is *ex delicto*, and another count which is in *assumpsit*, is subject to demurrer for misjoinder of actions.—*Evans v. So. R. Co.*, 482.
2. *Same; same; action for breach thereof.*—In an action against a railroad company to recover damages to the plaintiff's stock, resulting from the breach of a contract entered into between the plaintiff and the defendant, by which the railroad company agreed to build and maintain fences and cattle guards through the land of the plaintiff, it is unnecessary for the complaint to aver when the contract was first broken; since the breaches may be several and continuous.—*Ib.* 482.
3. *Action upon contract to pay property; what necessary to maintain suit.*—In a contract to pay property or for the delivery of personal property, an action for the value of the property can not be maintained until there has been a demand made for the property and a refusal or failure to deliver it, unless it be shown that such demand would have been futile; and a complaint upon such a contract which alleges neither demand nor refusal, nor any facts which would have excused the making of it, is faulty and subject to demurrer.—*Ingram v. Bussey*, 539.

ADVERSE POSSESSION.

1. *Ejectment; when adverse possession shown.*—In an action of ejectment, where the plaintiffs claim title as heirs at law of their deceased father, and the defendant who was also a son of the deceased claimed title by adverse possession, and it is shown without conflict that during the period of defendant's occupation of the land down to the death of the father, the father lived on the land with the defendant and his family, that the defendant gave in the lands for taxes in the name of his father, and by other unequivocal acts recognized the latter's title to the land, and the evidence further shows that the defendant entered into possession by permission of the father and not in hostility to him, the law in such case refers the possession to the title, and the defendant is shown not to have been in adverse possession; and under such evidence the plaintiffs will be entitled to recover.—*Butler v. Butler*, 373.
2. *Same; adverse possession; when declarations by defendant not admissible in evidence.*—In an action of ejectment, where the plaintiffs claim title as heirs at law of their deceased father, and the defendant who was also a son of the deceased claims title by adverse possession, and it is shown that during the period of the defendant's occupation of the land down to the death of the father, the latter also lived on the land with the defendant and his family, and by unequivocal acts throughout that period recognized the title of his father to the lands, and that his possession was acquired by permission of the father, declarations of the defendant to a third person that he claimed the land as his own, are of no consequence, and are immaterial and inadmissible in evidence.—*Ib.* 373.

ADVERSE POSSESSION—*Continued.*

3. *Adverse possession; can not arise from premissive entry.*—Where entry is made upon land by permission of the owner, the possession following such entry is not adverse, but is in subordination to the rightful title.—*Hicks Bros. v. Swift Creek Mill Co.*, 411.
4. *Judicial sale; not affected by maintenance or adverse possession.* A judicial sale made by a public officer under legal process, is not without the doctrine of champerty or maintenance; and its validity is not affected by the fact that the land is, at the time of the sale, in the possession of a third person claiming adversely to the defendant in the process.—*Griffin v. Dauphin*, 543.
5. *Same; effect on the possession of third person through tenant.* Where, at the time of a sale under execution of land in the possession of tenants of a third party who claim under a deed from the defendant in execution, which deed was executed subsequent to the issuance of the execution, the judicial sale of such lands terminates the tenancy; and the attornment of the tenants of said third party to the purchaser has the legal effect of transferring the possession of the lands from such third party to the purchaser, and the right of said third party acquired by his deed from the defendant in execution is thereby defeated; the sheriff's deed to said purchaser conveying such title as the defendant in execution had on the date of its issuance.—*Ib.* 543.
6. *Foreclosure of mortgage; when decree failing to pass upon claim under adverse possession proper.*—Under a bill filed for the sole purpose of the foreclosure of a mortgage, where it is alleged that the mortgagor died intestate, and the parties defendant are the sole heirs of the deceased mortgagor, but one of the defendants sets up in her answer a title to the mortgaged property claimed to have been derived by adverse possession, a decree providing for the divestiture by foreclosure of all the interest in the mortgaged property shown by the bill to be in the defendants as heirs at law of the deceased mortgagor, but falls and declines to pass upon the alleged title of the defendant claimed by adverse possession, expressly excepting from its operation any interest said defendants may have had in the mortgaged property, independent of the mortgagor, is proper and free from error; the bill not assailing the title of said defendants claimed to have been derived through adverse possession.—*Equit. M. Co. v. Finley*, 575.
7. *Same; same.*—In such a case, the purpose of the foreclosure suit being not to determine in whom the title resides, but to settle the interest claimed or existing in subordination to the mortgage, the defendant asserting the title by adverse possession was a proper party defendant, and the bill should not have been dismissed as to her; since, being an heir of the mortgagor, she took an equity of redemption, and the foreclosure of that interest was necessary to the enforcement of the mortgage.—*Ib.* 575.

AGENCY.

1. *Debtor and creditor; principal and agent; compensation of agent, when excessive.*—Where the amount of the income in the way of rents from certain plantations was about twenty-five hundred dollars, a charge of two thousand dollars for a

AGENCY—*Continued.*

year's services rendered by an agent in letting out and collecting the rents and looking after the repairs on said plantations, and visiting the plantations three or four times during the year, is excessive; three hundred dollars being a fair and reasonable compensation therefor.—*Russell v. Davis*, 647.

APPEAL AND ERROR.

1. *Indictment for murder; when refusal to give charge requested need not be considered on appeal.*—Where, on a trial under an indictment for murder, the defendant was convicted of manslaughter, the refusal of the trial court to give a charge requested by him which had reference alone to murder need not be considered on appeal; the conviction of manslaughter being an acquittal of murder.—*Mitchell v. State*, 65.
2. *Trial and its incidents; motion in arrest of judgment must be shown by the record.*—A motion in arrest of judgment must be presented to the Supreme Court for revision by the record; and when such motion appears only in the bill of exceptions it will not be considered on appeal.—*Durrett v. State*, 119.
3. *Bill of exceptions; when not considered on appeal.*—When the time for signing a bill of exceptions reserved in the trial of a case in the criminal court of Jefferson county, is not extended by order of the court or written agreement of counsel to be shown by the record, and the bill of exceptions is signed after the expiration of the time fixed by statute for signing bills in said court, such bill of exceptions will not be considered on appeal.—*Brown v. State*, 152.
4. *Same; same.*—When a bill of exceptions reserved in the trial of a case is not signed within the time fixed by statute, nor is the time for signing it extended by order of the court or agreement of counsel, shown upon the record, an agreement between counsel made after the expiration of the time prescribed for signing bills of exceptions in said court, that said bill of exceptions should be then signed, is not effective to restore the authority for signing and is insufficient to give validity to a bill of exceptions signed at such time, so as to authorize its being considered on appeal.—*Ib.* 152.
5. *Motion in arrest of judgment; how should be shown on appeal.* A motion in arrest of judgment, the ruling thereon, and the reservation of the question as to such ruling can not be presented on appeal by bill of exceptions, but must be shown by the record proper; and when presented only by bill of exceptions, the ruling of the trial court thereon will not be reviewed.—*Hampton v. State*, 180.
6. *Same; when properly made.*—In a criminal case, a motion in arrest of judgment must be disposed of by being denied or granted after the verdict, and before the court proceeds to pronounce sentence upon the accused; and when not made until after the sentence is pronounced, such motion comes too late.—*Ib.* 180.
7. *Pleading and practice; how motion considered on appeal; bill of exceptions.*—The ruling of the trial court upon a motion to require the plaintiff to pay certain costs as a condition to the further prosecution of his action will not be reviewed on appeal, unless the motion is incorporated in the bill of exceptions; and it is not sufficient for the presentation of the rulings upon such motion that a copy thereof appears as a part of the record in the transcript.—*Hamilton v. Maxwell*, 233.

APPEAL AND ERROR—*Continued.*

8. *Petition for intervention; decree sustaining demurrers thereto will not support appeal.*—Where a petition is filed in a pending suit in equity by a third person in which he asks to be allowed to intervene in said suit, and upon demurrers interposed to such petition the chancellor renders a decree sustaining them, but does not dismiss the petition, such decree is interlocutory and will not support an appeal.—*Walker v. N. G., L. & T. Co.*, 240.
9. *Appeal from probate court; when bill of exceptions should be stricken from the record.*—Where the bill of exceptions in a cause tried in the probate court is not signed until after the expiration of the ten days from the date of the decree or judgment, and there is no order made by the court allowing said bill of exceptions to be signed after the expiration of the ten days, and no agreement by counsel in writing to such effect, such bill of exceptions will not be considered by the Supreme Court on appeal, but will be stricken from the record on motion properly made.—*Beatty v. Hobson*, 270.
10. *Same; judgment upon motion for new trial not revisable.*—The statute allowing appeals from judgments granting or refusing to grant motions for a new trial, applies only to civil causes in the circuit and city courts, (Code, § 434); and, therefore, the action of the probate court in overruling and refusing to grant a motion for a new trial in a cause pending in such court is not revisable on appeal.—*Ib.* 270.
11. *Appeals; when error in ruling upon evidence without injury.* Where upon the trial of a case, the evidence adduced was not sufficient to authorize the plaintiff's recovery, error in the admission or exclusion of evidence is without injury to the plaintiff, and will not work a reversal of the judgment rendered in favor of the defendant.—*Cash v. So. Express Co.*, 272.
12. *Pleading and practice; how motions considered on appeal.*—The motion docket of the circuit court is not a record of that court, and a ruling by said court upon a motion spread upon the motion docket can not be reviewed on appeal, unless the motion is incorporated in the bill of exceptions, or the transcript shows that said motion was enrolled upon the records of the circuit court by an order thereof.—*Craig v. Etheredge*, 284.
13. *Trial and its incidents; how judgment by court without jury reviewed on appeal.*—Where a case is tried by the court without the intervention of a jury, and the evidence is in conflict, the judgment rendered by the court will not be reversed, unless it is plainly erroneous.—*Laster v. Blackwell*, 337.
14. *Same; same; action of ejectment.*—In an action of ejectment the cause was tried by the court without the intervention of a jury. The only witnesses testifying in the case were introduced by the plaintiff. The material contention was as to the contents of a lost deed; the plaintiff's contention being that this deed conveyed a life estate to their mother, with remainder in fee to them, while the defendant's contention was that said deed conveyed an absolute fee simple title in the mother. The testimony of four of the witnesses introduced by the plaintiff tended to show that the life estate to the mother with remainder to her children was conveyed by said deed, but the statements of these witnesses were more of their construction of the deed than statements as to their recollection of its contents, or the contents in substance, and two of the witnesses had never read the deed, but had heard it read about forty years before the trial. The other three of the witnesses

APPEAL AND ERROR—*Continued.*

introduced by the plaintiff had each read the deed, and each stated positively that it contained no conveyances of a life estate to the mother with remainder to her children, but was an absolute warranty deed to the mother, saying nothing about a life estate. *Held:* That with such conflict in the testimony of the witnesses introduced by the plaintiff, the judgment of the court in favor of the defendant could not be said to be plainly erroneous, and, therefore, such judgment will not be reversed.—*Ib.* 337.

15. *Same; same.*—To reverse a judgment on appeal, there must be manifest error appearing in the record; and in an action of ejectment, where the plaintiffs claim title as remaindermen under a lost deed, but there is no evidence in the record that the life tenant was dead at the commencement of the suit, a judgment in favor of the defendant can not be said to be erroneous, and will not be reversed.—*Ib.* 337.
16. *Appeal from judgment by justice of the peace; not necessary that the paper sent up by the justice should be certified.* Where an appeal is taken from a judgment of a justice of the peace to the circuit court, it is not necessary for the justice of the peace to certify anything; but all that is required by the statute, (Code, § 484), is that he must return all the original papers in the cause, together with the statement of the case and judgment rendered, signed by him.—*Hardee v. Abraham*, 341.
17. *Same; when not necessary for new complaint to be filed; sufficiency of judgment by default.*—When on an appeal taken from a judgment of the justice of the peace, there is included in the original papers returned by the justice to the clerk of the court to which the appeal is taken, a perfectly good complaint, it is proper for the court to which the appeal is taken to enter upon the trial on that complaint; or, the defendant not appearing, to render judgment by default on that complaint.—*Ib.* 341.
18. *Probate court what decree will support an appeal.*—Where objections to a claim against an insolvent estate are filed after the time prescribed therefor by statute and are apparently invalid, an order of the probate court, made in advance of the settlement, striking them from the file, will not support an appeal; the order in such case not being within the purview of subdivision 6, section 458 of the Code, or of other statutes, providing for appeals.—*Christopher v. Stewart*, 348.
19. *Equity pleading; cross appeal necessary to review rulings adverse to appellee.*—On an appeal from a decree of the chancery court, a cross appeal or cross assignments of error by the appellees are necessary for the appellees to have any rulings of the court adverse to them reviewed by the Supreme Court.—*Long v. Campbell*, 353.
20. *Bill of exceptions; when will not be considered on appeal.*—When the bill of exceptions is signed by the presiding judge in vacation, and there does not appear in the record that an order was made by the court in term time authorizing it to be signed after the adjournment of the court at which the trial was had, and there appears no agreement of counsel as provided by statute, such bill of exceptions will not be considered by the appellate court for any purpose; and the recital at the close of said bill of exceptions that it was tendered and approved "within the time prescribed by the court in which the bill of exceptions may be signed," amounts to nothing more than the statement of the judge, and is insufficient to supply the omission of an order of the court.—*Massillon E. & T. Co. v. Arnold*, 368.

APPEAL AND ERROR—Continued.

21. *Equity pleading; appeal does not lie from interlocutory decree on motion to strike parts of the bill.*—An appeal does not lie from an interlocutory decree on a motion to strike parts of the bill, and the fact that the ruling on such motion is contained in an interlocutory decree on demurrer does not confer jurisdiction on the appellate court to review the rulings on the motion to strike.—*Hood v. So. R. Co.*, 374.
22. *Bill of exceptions; when stricken from the file on appeal.*—Where a bill of exceptions, copied in the transcript in a case on appeal contains a verbatim report of the examination of all the witnesses, and further contains much that transpired during the trial, such as remarks of the judge and of counsel, questions not answered and rulings not excepted to, which was wholly unnecessary to be considered by the appellate court in passing on the questions presented for review, there is such a flagrant violation of the rule of practice regarding the preparation of bill of exceptions, (Code, p. 1201, Rule 33), that such bill of exceptions will, upon proper motion made, be stricken from the transcript.—*So. R. Co. v. Jackson*, 384.
23. *Pleading and practice; error without injury; appeal.*—Where in the trial of a case after the plaintiff's demurrers to special pleas are overruled, and his replications to the special pleas are stricken from the file, he declines to take issue on the special pleas and takes issue on the plea of the general issue, but introduced no evidence in support of his complaint, any error in the rulings of the court on the pleadings are without injury, and he can not have such rulings reviewed on appeal.—*Cross v. Esslinger*, 409.
24. *Bill of exceptions; record must show that same was signed in term time or within the time fixed by court or by agreement of parties.*—Before a bill of exceptions can be considered a part of the transcript in a case on appeal, the record must affirmatively show that said bill of exceptions was signed in term time or in the time fixed by the court in term time, or by agreement of counsel as required by statute (Code, §§ 616, 617); and the mere recital in the bill of exceptions that it was signed "within the time allowed by the orders of this court," is not sufficient.—*Andrews v. Meadow*, 442.
25. *Bill of exceptions; will not be considered when not signed by judge.*—A bill of exceptions which was never signed by the presiding judge, and is not established as provided by statute, will not be considered in the review of the case by the Supreme Court, although there was an agreement of counsel that the same should be considered and treated as a bill of exceptions in said cause; such agreement being entered into by reason of the judge who presided in said cause having died before the bill of exceptions was prepared.—*N., C. & St. Louis R. Co. v. Bates*, 447.
26. *Pleading and practice; when error in rulings of trial court upon the pleadings will not work reversal.*—Unless it affirmatively appears that the refusal of a trial court to strike immaterial and irrelevant averments from the complaint results in injury to the defendant, such refusal, although erroneous, does not constitute a reversible error.—*Montgomery St. R. Co. v. Mason*, 508.
27. *Same; when error in ruling upon motion to strike certain portions of the complaint without injury.*—Where, in an action to recover damages for personal injuries, the defendant moved to strike certain parts of the complaint as being immaterial averments and merely surplusage, which motion the court overruled, and after such ruling on the part of the

APPEAL AND ERROR—*Continued.*

- court the plaintiff amends the complaint by striking out the part thereof to which the motion to strike was directed, no injury results to the defendant in overruling the motion, and such ruling by the trial court, although erroneous, does not constitute a reversible error.—*Ib.* 508.
28. *Bill of exceptions; how it should be shown that the bill was signed in vacation.*—Where a bill of exceptions purports to be signed in vacation, and there is in the record neither order of the court nor agreement extending the time for signing, such bill of exceptions will not be considered on appeal, although it contains a recital to the effect that it was signed within the time allowed by the order of the court; such recital being merely a statement of the judge, and, therefore, can not be looked to as establishing an order of the court allowing the bill to be signed in vacation.—*Lindsey v. Kenan*, 532.
29. *New trials; review of judgment granting same.*—When an appeal is taken from an order of the trial court granting a new trial, the Supreme Court will not reverse such judgment, unless the evidence plainly and palpably supports the verdict. *Merrill v. Brantley & Co.*, 537.
30. *Equity pleading; objection to bill raised for the first time in Supreme Court comes too late.*—Where a bill is filed to set aside and annul a deed conveying a life estate and an estate in remainder, and the life tenant and the remaindermen are both made parties defendant, and pending such suit the life tenant dies, and thereafter the case proceeds without objection on the part of the remaining defendants as if the life tenant had never been named as a party to the bill, there should be either a suggestion of the death of the life tenant and a discontinuance as to such party, or an amendment striking out the name as a party respondent; but if the objection to this not being done is not made while the cause is pending in the chancery court, but is made for the first time when the case is on appeal to the Supreme Court, such objection comes too late and will not be entertained. *Letohatchie Baptist Church v. Bullock*, 548.
31. *Sufficiency of plea in chancery suit; how considered on appeal; when no ruling shown.*—Where in a chancery suit, there are pleas interposed and a motion to strike them is filed, but such motion was not considered by the court, nor submitted to be passed on, it will be presumed, on appeal, that the motion was abandoned, and that the cause was tried upon issue taken on said plea.—*Adair & Co. v. Feder*, 620.
32. *Appeals; how decree of chancery court considered.*—On an appeal from a decree rendered in a chancery suit, the Supreme Court must not, under the provisions of the statute, (Code, § 3826, subd. 1) indulge any presumption in favor of the chancellor's finding on the facts, but it is the duty of the Supreme Court to weigh the evidence and give judgment as they deem just.—*Shows v. Folmar Sons & Co.*, 599.

ARBITRATION.

1. *Insurance; arbitration clause; result of refusal to comply with provisions by one of the parties.*—Where in a policy of fire insurance, there is contained a provision for arbitration of the amount of the loss in the event of a disagreement as to such amount, if either party, after a disagreement as to the amount of the loss and a request by the other party for arbitration, in bad faith prevent such ascertainment by arbitration by refusing to proceed therewith, or by insisting upon

ARBITRATION—*Continued.*

the selection of improper arbitrators, or by undue interference with them after their selection, the other party is thereby absolved from further obligation to arbitrate; and if such fault be attributable to the insured it is a defense to the action on the policy, but if to the insurer, the lack of an award is not available to defeat a recovery on such policy. *Hall & Bro. v. Western Assur. Co.*, 637.

2. *Same; same; same.*—Where the arbitration clause in a policy of fire insurance provides that in the event of a disagreement as to the amount of the loss, the amount of the loss should be ascertained by arbitration, and that the arbitrators should each be "competent and disinterested," if, under the agreement for submission to arbitration under such clause the arbitrator named by the insurer is not disinterested and this fact is known to the insurer, but unknown to the insured, the latter is not bound by the agreement to arbitrate, although the selection of such interested or partial arbitrator was agreed to by him; and under such circumstances the insurer is at liberty to prosecute a suit upon the policy of insurance and the agreement of submission to arbitrate presents no defense to the action.—*Ib.* 637.

ASSAULT AND BATTERY.

See CRIMINAL LAW, SUB-TITLE.

ASSIGNMENTS.

1. *Creditor's bill to declare void deed of assignment; to what property lien attaches.*—The lien acquired by the filing of a bill by a creditor without a lien, for the purpose of setting aside a conveyance by his debtor, upon the ground of fraud, attaches only to the property embraced in the fraudulent deed or conveyance, and does not attach to any property excepted from the operation of said deed.—*Long v. Campbell*, 353.
2. *Fraudulent conveyance; deed of assignment to be void must be fraudulent in its inception.*—To declare a deed of assignment void by reason of fraud, it must be shown that fraud entered into the assignment at the time of its execution, since no subsequent acts of the party can invalidate an assignment; and, therefore, if a deed of assignment, made by a creditor for the benefit of his debtors, was in its inception *bona fide* and free from fraud, collusive acts of the grantor and assignor subsequent to its execution will not render such a deed void. *Ib.* 353.
3. *Deed of assignment; not fraudulent by excepting therefrom homestead of grantor.*—A deed of assignment in which the grantor conveys all of his property of every kind and description "except his homestead in which he now resides," is not rendered fraudulent by reason of such exception. Such exception is not such a reservation of benefit to the debtor as avoids a conveyance by him; and by such exception the homestead is not conveyed and is subject to legal process by the creditors of the grantor just as it was before the making of the deed of assignment.—*Ib.* 353.
4. *Equitable assignment and subrogation; when shown to exist.* Where one who, though having no previous interest and being under no obligation, pays off a mortgage or advances money for its payment at the instance of the mortgagor, and for his benefit, such person is in no true sense a stranger and volunteer, but is, under the doctrine of equitable assignment, entitled to be subrogated to the lien of said mortgage for the reimbursement of the amount paid thereon.—*Notes v. Robertson*, 630.

ASSUMPSIT, ACTION OF.

1. *Railroads; when complaint is in assumpsit and not in case.*—In an action against a railroad company to recover damages for the loss of hogs, a count of the complaint, which after averring that the stock were killed by being run over by a train operated on the defendant's road, then avers that the defendant had contracted with the plaintiff that, in consideration of the construction of a right of way over plaintiff's lands, it would keep the railroad fenced on both sides through plaintiff's lands and keep and maintain cattle guards at the boundary of plaintiff's lands, and that while the defendant had constructed such fences and cattle guards, it carelessly and negligently allowed the same to get out of repair and become destroyed, and that by reason of such failure and negligence of duty on the part of defendant the plaintiff's stock entered upon the defendant's railroad track and was killed, states a cause of action in assumpsit. (Tyson, J., *dissenting*), holds that such count states a cause of action in case.)—*Evans v. So. R. Co.*, 482.

ATTACHMENTS.

1. *Action on an attachment bond; admissibility of evidence.*—In an action upon an attachment bond, where it is shown that the writ of attachment was not in the file and was lost, it is competent for the plaintiff to introduce in evidence the motions made by the defendants in the attachment suit to substitute the writ of attachment and for a writ of *venditioni exponas* directing the sheriff to sell the property levied upon as shown by his return on the attachment writ.—*Hamilton v. Maxwell*, 233.
2. *Same; secondary evidence.*—In an action upon an attachment bond, where evidence is introduced that the writ of *venditioni exponas*, issued under an order of the court directing the sale of the property levied upon under a writ of attachment, was not in the file of papers in the case, and could not be found after diligent search by the clerk and sheriff in the places where such papers were usually kept, and could not be found in the office of either of such officers, secondary evidence of the contents of such *venditioni exponas* and of its execution, is admissible in evidence.—*Ib.* 233.
3. *Action upon attachment bond; plea of set off; when judgment exorbitant.*—In an action upon an attachment bond, where the defendants file a plea of set off, and the evidence shows an indebtedness from the plaintiff to the defendant to the extent of \$275.22, and the actual damages shown by the plaintiff's testimony to have been sustained by him on account of the wrongful suing out of the attachment amounts to \$366.90, a verdict of the jury assessing the plaintiff's damages at \$258.38 is exorbitant; and constitutes a ground for the granting of a new trial.—*Ib.* 233.
4. *Bill to annul proceedings in attachment suit; burden of proof; sufficiency of evidence.*—Where a bill is filed by creditors to have annulled proceedings in an attachment suit, whereby the goods of complainant's debtor were seized and sold, upon the ground that the attachments were sued out by the attaching creditors in collusion with the debtor, without the existence of any statutory ground therefor, and for the purpose of hindering, delaying and defrauding the complainants and other creditors, the burden of proving the charges made is upon the complainant; and where the evidence introduced shows without conflict that the defendant in attachment was indebted to the plaintiffs in said suit and the evidence further tended

ATTACHMENTS—*Continued.*

strongly to show that there was at least probable cause for the issuance of the attachment, the averments of fraud contained in such bill are not sustained, and upon such evidence the complainants are not entitled to relief.—*Adair & Co. v. Feder*, 620.

5. *Attachment; mere fact that the defendant knew of issuance does not show fraud.*—The mere knowledge on the part of the defendant in attachment that the plaintiffs in such suit were purporting to sue out writs of attachment, or a willingness on the part of such defendant that the attachment should be sued out, does not, of itself, raise the presumption that there was a covinous agreement or fraudulent collusion between the plaintiffs and the defendant in suing out the attachment. *Ib.* 620.

ATTORNEY.

1. *Argument of counsel; failure to examine witness; error without injury.*—In the trial of a criminal case, the failure of the defendant to introduce a witness subpoenaed and present, in support of the testimony of another witness examined in behalf of the defendant in reference to a fact wholly immaterial and irrelevant to any issue involved in the trial, is not the legitimate subject of comment by an attorney for the prosecution in his argument to the jury; but the refusal of the court to stop the State's counsel in commenting upon such failure of the defense is error without injury, and, therefore, will not, under the statute (Code, § 4333), work the reversal of the judgment of conviction.—*Lide v. State*, 43.
2. *Same.*—Every fact which the testimony tends to prove and every inference counsel may think arises out of the testimony, is legitimate subject of criticism and discussion in the argument of counsel before juries.—*Ib.* 43.
3. *Homicide; agreement between counsel not binding upon jury.*—On a trial under an indictment for murder, where it is agreed between the solicitor for the State and the defendant that the defendant shall withdraw his plea of not guilty and enter a plea of guilty, and that the solicitor should state to the jury that the State would be satisfied with the sentence of life imprisonment, as a punishment, such agreement is not binding upon the jury and amounts to nothing more than a recommendation; and if the jury declines to carry out such agreement and by their verdict imposes the death penalty, such verdict of the jury is valid and binding. *Durrett v. State*, 119.
4. *Charge relating to argument of counsel properly refused.*—It is not error for the court to refuse to give charges having no other purpose than to respond to or off-set the argument made before the jury by the prosecuting officer.—*White v. State*, 122.
5. *Trial and its incidents; reading from law books in argument to jury.*—It is not error for the court to refuse to allow defendant's counsel in his argument to the jury to read extracts from law books.—*Walkley v. State*, 183.

BILL OF EXCEPTIONS.

1. *Bill of exceptions; when not considered on appeal.*—When the time for signing a bill of exceptions reserved in the trial of a case in the criminal court of Jefferson county, is not extended by order of the court or written agreement of counsel.

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BILL OF EXCEPTIONS—*Continued.*

- sel to be shown by the record, and the bill of exceptions is signed after the expiration of the time fixed by statute for signing bills in said court, such bill of exceptions will not be considered on appeal.—*Brown v. State*, 152.
2. *Same; same.*—When a bill of exceptions reserved in the trial of a case is not signed within the time fixed by statute, nor is the time for signing it extended by order of the court or agreement of counsel, shown upon the record, an agreement between counsel made after the expiration of the time prescribed for signing bills of exceptions in said court, that said bill of exceptions should be then signed, is not effective to restore the authority for signing and is insufficient to give validity to a bill of exceptions signed at such time, so as to authorize its being considered on appeal.—*Ib.* 152.
 3. *Pleading and practice; how motion considered on appeal; bill of exceptions.*—The ruling of the trial court upon a motion to require the plaintiff to pay certain costs as a condition to the further prosecution of his action will not be reviewed on appeal, unless the motion is incorporated in the bill of exceptions; and it is not sufficient for the presentation of the rulings upon such motion that a copy thereof appears as a part of the record in the transcript.—*Hamilton v. Maxwell*, 233.
 4. *Appeal from probate court; when bill of exceptions should be stricken from the record.*—Where the bill of exceptions in a cause tried in the probate court is not signed until after the expiration of the ten days from the date of the decree or judgment, and there is no order made by the court allowing said bill of exceptions to be signed after the expiration of the ten days, and no agreement by counsel in writing to such effect, such bill of exceptions will not be considered by the Supreme Court on appeal, but will be stricken from the record on motion properly made.—*Beatty v. Hobson*, 270.
 5. *Bill of exceptions; when will not be considered on appeal.*—When the bill of exceptions is signed by the presiding judge in vacation, and there does not appear in the record that an order was made by the court in term time authorizing it to be signed after the adjournment of the court at which the trial was had, and there appears no agreement of counsel as provided by statute, such bill of exceptions will not be considered by the appellate court for any purpose; and the recital at the close of said bill of exceptions that it was tendered and approved "within the time prescribed by the court in which the bill of exceptions may be signed," amounts to nothing more than the statement of the judge, and is insufficient to supply the omission of an order of the court.—*Massillon E. & T. Co. v. Arnold & Co.*, 368.
 6. *Bill of exceptions; when stricken from the file on appeal.*—Where a bill of exceptions, copied in the transcript in a case on appeal contains a verbatim report of the examination of all the witnesses, and further contains much that transpired during the trial, such as remarks of the judge and of counsel, questions not answered and rulings not excepted to, which was wholly unnecessary to be considered by the appellate court in passing on the questions presented for review, there is such a flagrant violation of the rule of practice regarding the preparation of bill of exceptions, (Code, p. 1201, Rule 33), that such bill of exceptions will, upon proper motion made, be stricken from the transcript.—*So. R. Co. v. Jackson*, 384.
 7. *Bill of exceptions; record must show that same was signed in term time or within the time fixed by court or by agreement of parties.*—Before a bill of exceptions can be considered a part of the transcript in a case on appeal, the record must af-

BILL OF EXCEPTIONS—*Continued.*

firmatively show that said bill of exceptions was signed in term time or in the time fixed by the court in term time, or by agreement of counsel as required by statute (Code, §§ 616, 617); and the mere recital in the bill of exceptions that it was signed "within the time allowed by the orders of this court," is not sufficient.—*Andrews v. Meadow*, 442.

8. *Bill of exceptions; will not be considered when not signed by judge.*—A bill of exceptions which was never signed by the presiding judge, and is not established as provided by statute, will not be considered in the review of the case by the Supreme Court, although there was an agreement of counsel that the same should be considered and treated as a bill of exceptions in said cause; such agreement being entered into by reason of the judge who presided in said cause having died before the bill of exceptions was prepared.—*N., C. & St. L. R. Co. v. Bates*, 447.
9. *Bill of exceptions; how it should be shown that the bill was signed in vacation.*—Where a bill of exceptions purports to be signed in vacation, and there is in the record neither order of the court nor agreement extending the time for signing, such bill of exceptions will not be considered on appeal, although it contains a recital to the effect that it was signed within the time allowed by the order of the court, such recital being merely a statement of the judge, and, therefore, can not be looked to as establishing an order of the court allowing the bill to be signed in vacation.—*Linasey v. Kenan*, 532.

BILLS OF EXCHANGE AND BANK CHECKS.

1. *Bank check included in bill of exchange.*—Bank checks are included in the words "bills" and "bills of exchange," as used in the statutes of this State relating to commercial paper.—*Andrews v. Meadow*, 442.

BONDS.

1. *Sheriff; sufficient execution of sheriff's bond.*—Where a sheriff, before entering upon the discharge of his duties as such officer, prepares his official bond, writing his name and the name of his sureties in the body of the bond, but through oversight fails to sign the bond as principal obligor, though the same was signed by his sureties, and the bond so filled out and signed was by said sheriff delivered to the probate judge and was approved and recorded by him as said sheriff's official bond, and he, thereupon, entered upon the discharge of his duties as such sheriff under said bond, and acted as said sheriff, such bond, as to the sureties signing it stands, under the provisions of the statute, (Code, § 3089) in the place of the official bond of the sheriff subject, if its conditions are broken, to all the remedies which the person aggrieved might have maintained on the official bond of such sheriff, executed, approved and filed according to law. (Tyrson, J., dissenting).—*McKissack v. McClendon*, 558.

CASE, ACTION ON THE.

1. *Railroad; when complaint is in assumpsit and not in case.*—In an action against a railroad company to recover damages for the loss of hogs, a count of the complaint, which after averring that the stock were killed by being run over by a train operated on the defendant's road, then avers that the defendant had contracted with the plaintiff that, in consideration

CASE, ACTION ON THE.—*Continued.*

of the construction of a right of way over plaintiff's lands, it would keep the railroad fenced on both sides through plaintiff's lands and keep and maintain cattle guards at the boundary of plaintiff's lands, and that while the defendant had constructed such fences and cattle guards, it carelessly and negligently allowed the same to get out of repair and become destroyed, and that by reason of such failure and negligence of duty on the part of defendant the plaintiff's stock entered upon the defendant's railroad track and was killed, states a cause of action in assumpsit. (Tyson, J., *dissenting*, holds that such count states a cause of action in case.)—*Evans v. So. R. Co.*, 482.

CHANCERY.

I. JURISDICTION AND GENERAL PRINCIPLES.

1. *Petition for intervention; decree sustaining demurrers thereto will not support appeal.*—Where a petition is filed in a pending suit in equity by a third person in which he asks to be allowed to intervene in said suit, and upon demurrers interposed to such petition the chancellor renders a decree sustaining them, but does not dismiss the petition, such decree is interlocutory and will not support an appeal.—*Walker v. Nat. G. L. & T. Co.*, 240.
2. *Corporations; right of minority stockholder to maintain bill to distribute assets of corporation.*—When a private business corporation, though solvent, in that it owes no debts, is a failure, and the purposes for which it was organized are impossible of attainment, and its assets are being gradually sacrificed in the payment of taxes and expenses, the minority stockholders of such corporation can maintain a bill in equity to have the corporate assets sold and the proceeds thereof distributed among the stockholders.—*Noble v. Gadsden L. & I. Co.*, 250.
3. *Injunction; railroad company can not enjoin ejectment for right of way which has not been paid for, without offering to compensate the owners.*—Where a right of way for a railroad has not been acquired by the railroad company, either by valid conveyance or under condemnation proceedings for such purpose, the railroad company can not maintain a bill to enjoin an action of ejectment brought against it by the owners of the land over which the road was constructed, without offering in the bill to do equity by paying compensation for the lands so used for a right of way; and this principle obtains although the owners of the land may have had knowledge of the location and construction of the railroad company's track across its lands, and allowed it to expend large sums of money for the purpose, without interference.—*Hood v. So. R. Co.*, 374.
4. *Same; fact that some of the owners of the property had conveyed their interest immaterial.*—In such a case, the necessity for offering to do equity by the complainant railroad company is not removed by the fact that some of the owners may have subsequently sold their interest in the lands to persons unknown to the complainant; since the offer to make compensation should be made to the original owners of the land. *Ib.* 374.
5. *Rescission of contract; offer to do equity.*—While a bill for rescission must ordinarily offer to do equity by putting the party against whom the rescission is directed *in statu quo* or returning to him the consideration with interest, if such

CHANCERY—*Continued.*

- party has been reimbursed of his expenditure by what he has received under the contract sought to be rescinded, such offer to do equity is not necessary to authorize the maintenance of the bill.—*Walling v. Thomas*, 426.
6. *Petition for intervention; right to maintain same can be waived.*—Although a person who is not a party to a pending suit in equity has originally no right to intervene in said cause for any purpose, yet the parties to that cause can waive their objections to such intervention, and when this is done, the equity set up by the intervenor can be litigated and determined as a part of the suit already pending.—*Douthitt v. Nabors*, 453.
 7. *Same; same; case at bar.*—Where a person who is not a party to a pending suit files a petition for intervention and complainant in the original bill answers said petition admitting all of its averments and the respondent to the original bill answers said petition and incorporated in his answer a demurrer which did not challenge the petitioner's right to come into the case, and some months later said respondent moves to dismiss the petition, but not on the ground that the petitioner had no right to file it in said cause, and such demurrer and motion are passed upon, such acts constitute a waiver by the parties to the original suit of any objection to the petitioner's right to intervene therein; and where, after such rulings are made for more than a year after the intervention is filed, the defendant in the pending suit moves to strike the petition for the intervention from the file upon the ground that he has no right to intervene, such motion comes too late.—*Ib.* 453.
 8. *Bill in equity to remove cloud from title; burden of proof.* Where a bill is filed by a married woman to remove a cloud from her title, and the title of the complainant is claimed by mesne conveyances from her husband, and the defendant in his answer sets up that the conveyances by which the complainant claims title were made to hinder, delay and defraud the defendant and other creditors of the husband, the burden is upon the complainant to establish her title and possession as alleged in the bill, and to show a consideration paid for the property, and in failing to meet this burden the complaint is not entitled to the relief prayed.—*Collier v. Carlisle*, 478.
 9. *Same; landlord and tenant; right of stranger to maintain bill.* The attornment of a tenant to a stranger does not, of itself, destroy the possession of the landlord; and when the possession of the rented premises is tortiously gained from the tenant, or the tenant has been induced to attorn to a stranger, a court of equity will not, on such possession, entertain a bill at the instance of the tort-feasor, or the person attorned to, to remove a cloud from his title to the land.—*Ib.* 478.
 10. *Duress as ground for equitable relief.*—Duress employed to procure a conveyance of property, although a species of fraud, is not of itself a ground for equitable interference.—*Treadwell v. Torbert*, 504.
 11. *Landlord and tenant; attornment to third person; right of stranger to maintain bill.*—The attornment of a tenant to any other person than his landlord, does not, of itself, destroy the possession of the landlord; and when the possession of the rented premises is tortiously or otherwise gained from the tenant, a court of equity will not, on such possession, entertain a bill at the instance of the tort-feasor, or the

CHANCERY—Continued.

- person attorned to, to remove a cloud from his title to the rented premises.—*Ib.* 504.
12. *Same; same; same.*—Where a person enters into possession of land as grantee under a deed alleged to have been obtained by duress and fraudulent representations, and leases said premises, the fact that the grantor in said deed subsequently secured the tenants of the grantee to attorn to her and made a contract agreeing to rent said lands to said tenants, does not give said grantor such a possession as will authorize him to maintain a bill in equity to have said deed cancelled and remove as a cloud from her title.—*Ib.* 504
 13. *Bill to set aside conveyance on account of undue influence; necessary allegations.*—In a bill filed seeking to have set aside and cancelled a deed, upon the ground that its execution was obtained by undue influence, it is not necessary to allege with particularity the manner in which the result complained of was accomplished, but only that the deed was procured to be executed by undue influence exerted by certain named parties; since the inquiry in such a case is not whether the improper influence was sufficient to have coerced the will of a man of ordinary capacity and force of character, but only whether the influence, whatever it may have been, did, in fact, control the execution of the instrument involved in the controversy.—*Letohatdite Baptist Church v. Bullock*, 548.
 14. *Bill for reformation of judgment; equity jurisdiction.*—A bill can not be maintained by one who was a party to an ejectment suit, for the purpose of having the judgment rendered in said suit reformed, so as to make it apply to other lands than those described in said judgment; said judgment being rendered in accordance with the plea of disclaimer and the suggestion of adverse possession for three years filed by the defendant in said ejectment suit, who sought to maintain the bill in equity.—*Meyer v. Calera Land Co.*, 554.
 15. *Nuisance; when bill can be maintained by private citizen for its abatement.*—A nuisance which operates to destroy the health of a family or to seriously diminish the comfortable enjoyment of a dwelling house, is productive of irreparable damage and mischief, for which the law furnishes no adequate remedy; and a person whose health or the comfort of whose house is damaged and affected thereby, may maintain a bill for the purpose of abating such nuisance.—*Richards v. Daugherty*, 569.
 16. *Same; same; mill dam.*—Where the erection of dams or other obstructions which materially affect the natural flow of a running stream, results in the injury to the health of persons living in the neighborhood, or in the vicinity, such dam or obstruction, constitutes a nuisance, and may be abated by bill in equity at the suit of a person, the health of whose family is injured thereby, without waiting the trial of the issue of the nuisance *vel non* by an action at law.—*Ib.* 569.
 17. *Same; same; same.*—Where a bill is filed to have a mill dam abated as a nuisance, upon the ground that it results in producing ill health in the family of the complainant and in the vicinity contiguous to the dam, the fact that the malaria which caused the ill health complained of was generated in part by other causes than the mill dam, constitutes of itself no defense to the maintenance of the bill, if it is further shown that the existence of the mill dam materially contributed to the condition naturally existing, producing malaria, and intensified or made more poisonous the malaria generated by other causes.—*Ib.* 569.

CHANCERY—Continued.

18. *Bill by junior mortgagee to redeem; should offer to do equity.*
Where a bill is filed by a junior mortgagee against the holder of a senior mortgage and seeks an accounting from him and the foreclosure of the mortgage held by the complainant, and that the complainant be allowed to redeem, it is necessary that such bill should offer to pay such sum as may be ascertained to be due upon the first mortgage; and in the absence of such offer the bill is subject to demurrer.—*Higman v. Humes*, 617.
19. *Same; necessary that second mortgage should be due and payable.*—One of the essential requisites of maintaining such a bill is that the mortgage debt of the complainant should be due and payable; and if the bill filed for such purpose does not aver that the complainant's mortgage is due and payable at the time of the filing thereof, it is subject to demurrer. *Id.* 617.
20. *Bill to annul proceedings in attachment suit; burden of proof; sufficiency of evidence.*—Where a bill is filed by creditors to have annulled proceedings in an attachment suit, whereby the goods of complainant's debtor were seized and sold, upon the ground that the attachments were sued out by the attaching creditors in collusion with the debtor, without the existence of statutory ground therefor, and for the purpose of hindering, delaying and defrauding the complainants and other creditors, the burden of proving the charges made is upon the complainant; and where the evidence introduced shows without conflict that the defendant in attachment was indebted to the plaintiffs in said suit and the evidence further tended strongly to show that there was at least probable cause for the issuance of the attachment, the averments of fraud contained in such bill are not sustained, and upon such evidence the complainants are not entitled to relief.—*Adair & Co. v. Feder*, 620.
21. *Bill for settlement of partnership when complainant not entitled to relief.*—Where a co-partnership was formed between individuals and a partnership, and after the dissolution of the co-partnership the partnership member of said firm files a bill seeking to have an accounting and settlement of said partnership, averring that although there had been a dissolution there had never been a settlement of the partnership affairs, and the individual member of said partnership in his answer admits the dissolution and denies that there had not been a settlement, and sets out facts going to show such settlement, and the evidence shows that after the dissolution there was a settlement of the partnership affairs between the individual member thereof and one of the firm constituting the other member, and that this member of the firm had the active management and control of said firm's business, and that the firm member of the partnership accepted the results of this settlement, the evidence in such case is insufficient to sustain the averments of the bill, but shows that the settlement of the partnership affairs had been had after its dissolution, and that, therefore, the complainant was not entitled to the relief prayed for.—*Shows v. Folmar Sons & Co.*, 599.

II. PLEADING AND PRACTICE.

1. BILLS AND PARTIES THERETO.

22. *Equity practice; when complainant can dismiss bill.*—As a general rule, a complainant has a right to dismiss a suit in equity whenever he elects to do so, but he can not, as a matter of right, dismiss his suit when the respondent has ac-

CHANCERY—Continued.

- quired rights in the proceeding by answer or cross bill, and would be prejudiced by such dismissal.—*Ex parte Jones*, 212.
23. *Chancery pleading and practice; when not necessary to make all persons interested in the cause parties to suit.*—When the parties to a cause are numerous or some of them are unknown or beyond the jurisdiction of the court, but they all belong to a class whose rights are analogous to those of the parties actually before the court, and who fully represent the adverse interest of all, it is not necessary under the rules of chancery practice, (Code, p. 1205, Rule 19, Chancery Practice), in order to the maintenance of a suit in chancery concerning the common cause of action, that all of the parties in interest should be made parties to such suit.—*Noble v. Gadsden L. & I. Co.*, 250.
24. *Same; same; case at bar.*—Where a bill is filed by the minority stockholders in a corporation, seeking to have the assets of the corporation distributed among all the stockholders, and it is averred in the bill that the stockholders of said corporation are numerous, that one-third of the stockholders are non-residents or their residence can not be ascertained, that the respondents are the principal and largest stockholders and fully and fairly represent the adverse interest of all of the stockholders in said corporation, that all of the stockholders belong to the same class and their respective interests are analogous, such bill is not subject to demurrer, upon the ground that all the stockholders are not made parties thereto. *Ib.* 250.
25. *Equity pleading; multifariousness.*—A bill in equity is not rendered multifarious by joining with matter proper for equitable action and relief other matters cognizable by courts of law.—*Letsatchie Baptist Church v. Bullock*, 548.
26. *Equity pleading; dismissal of original bill carries cross-bill.* A cross-bill which shows no equitable relief growing out of the subject matter of the original bill, and which has no independent equity which would sustain the jurisdiction of the court, is carried out of court by the dismissal of the original bill.—*Meyer v. Calera L. Co.*, 554.

2. CROSS-BILLS, PLEAS; MOTIONS; DEMURRERS.

27. *Bill to enjoin public nuisance; when plea bad for duplicity.* Where a bill is filed to enjoin the erection and maintenance of a part of a building which encroaches upon a sidewalk in a city, upon the ground that it was a public nuisance and obstructed the complainant's enjoyment of light, air and view, a plea which sets up that the complainant who owned the adjacent building consented to the encroachment upon the sidewalk, and which further sets up as a defense that the complainant was not entitled to have the light, air and view come to his building from that part of the street in front of defendant's building, to which the defendant has a fee, is bad for duplicity.—*First Nat. Bank v. Tyson*, 459.
28. *Equity pleading; objection to bill raised for the first time in Supreme Court comes too late.*—Where a bill is filed to set aside and annul a deed conveying a life estate and an estate in remainder, and the life tenant and the remaindermen are both made parties defendant, and pending such suit the life tenant dies, and thereafter the case proceeds without objection on the part of the remaining defendants as if the life tenant had never been named as a party to the bill, there should be either a suggestion of the death of the life tenant

CHANCERY—Continued.

- and a discontinuance as to such party, or an amendment striking out the name as a party respondent; but if the objection to this not being done is not made while the cause is pending in the chancery court, but is made for the first time when the case is on appeal to the Supreme Court, such objection comes too late and will not be entertained.—*Letch-atchie Baptist Church v. Bullock*, 548.
29. *Equity pleading; dismissal of original bill carries cross-bill.* A cross bill which shows no equitable relief growing out of the subject matter of the original bill, and which has no independent equity which would sustain the jurisdiction of the court, is carried out of court by the dismissal of the original bill.—*Meyer v. Calera Land Co.*, 554.
30. *Sufficiency of plea in chancery suit; how considered on appeal; when no ruling shown.*—Where in a chancery suit, there are pleas interposed and a motion to strike them is filed, but such motion was not considered by the court, nor submitted to be passed on, it will be presumed, on appeal, that the motion was abandoned, and that the cause was tried upon issue taken on said plea.—*Adair & Co. v. Feder*, 620.
31. *Same; decree should be rendered for defendant if pleas proven.* If the defendant in a chancery suit pleads to the whole bill and the complainant takes issue on the plea and it is established by the testimony, a decree should be rendered for the defendant and the bill dismissed; and this is true though the plea was insufficient and would have been so held if properly attacked.—*Id.* 620.

3. HEARING AND DECREES.

32. *Equity pleading; cross appeal necessary to review rulings adverse to appellee.*—On an appeal from a decree of the chancery court, a cross appeal or cross assignments of error by the appellees are necessary for the appellees to have any rulings of the court adverse to them reviewed by the Supreme Court.—*Long v. Campbell*, 353.
33. *Equity pleading; bill does not lie from interlocutory decree on motion to strike parts of the bill.*—An appeal does not lie from an interlocutory decree on a motion to strike parts of the bill, and the fact that the ruling on such motion is contained in an interlocutory decree on demurrer does not confer jurisdiction on the appellate court to review the rulings on the motion to strike.—*Hood v. So. R. Co.*, 374.
34. *Bill for a divorce; equity pleading; orders of chancellor for taking further testimony after submission of cause.*—On a bill filed by a husband against his wife for a divorce upon the ground of voluntary abandonment, a decree *pro confesso* was rendered. The cause was then submitted by complainant for decree in vacation upon testimony taken by him. After the submission, the chancellor, for the purpose of informing himself as to whether there existed a defense to the bill, prepared interrogatories to be propounded to the defendant, which he directed the register to have answered. The register obeyed these instructions, but the complainant had no knowledge or notice of the time and place of taking the answers, nor was he given an opportunity to file cross interrogatories, to cross examine the defendant as a witness. *Held*: That in such a proceeding the complainant was denied a right to which he was entitled, and that the answers of the respondent to the interrogatories so propounded should not have been considered by the chancellor as evidence, and that,

CHANCERY—*Continued.*

therefore, a decree, based upon such answer denying to complain the divorce as prayed for, was erroneous.—*Wilkinson v. Wilkinson*, 381.

35. *Foreclosure of mortgage; when decree failing to pass upon claim under adverse possession proper.*—Under a bill filed for the sole purpose of the foreclosure of a mortgage, where it is alleged that the mortgagor died intestate, and the parties defendant are the sole heirs of the deceased mortgagor, but one of the defendants sets up in her answer a title to the mortgaged property claimed to have been derived by adverse possession, a decree providing for the divestiture by foreclosure of all the interest in the mortgaged property shown by the bill to be in the defendants as heirs at law of the deceased mortgagor, but fails and declines to pass upon the alleged title of the defendant claimed by adverse possession, expressly excepting from its operation any interest said defendants may have had in the mortgaged property, independent of the mortgagor, is proper and free from error; the bill not assailing the title of said defendants claimed to have been derived through adverse possession.—*Equit. M. Co. v. Finley*, 575.
36. *Same; same.*—In such a case, the purpose of the foreclosure suit being not to determine in whom the title resides, but to settle the interest claimed or existing in subordination to the mortgage, the defendant asserting the title by adverse possession was a proper party defendant, and the bill should not have been dismissed as to her; since, being an heir of the mortgagor, she took an equity of redemption, and the foreclosure of that interest was necessary to the enforcement of the mortgage.—*Ib.* 575.
37. *Decree should be rendered for defendant if pleas proven.*—If the defendant in a chancery suit pleads to the whole bill and the complainant takes issue on the plea and it is established by the testimony, a decree should be rendered for the defendant and the bill dismissed; and this is true though the plea was insufficient and would have been so held if properly attacked.—*Adair & Co. v. Feder*, 620.
38. *Appeals; how decree of chancery court considered.*—On an appeal from a decree rendered in a chancery suit, the Supreme Court must not, under the provisions of the statute, (Code, § 3826, subd. 1), indulge any presumption in favor of the chancellor's finding on the facts, but it is the duty of the Supreme Court to weigh the evidence and give judgment as they deem just.—*Shows v. Folmar Sons & Co.*, 599.

CHARGES OF COURT TO JURY.

1. *Assault with intent to rape; charge to the jury.*—On a trial under an indictment for an assault with intent to rape, a charge is not improperly given at the request of the State, which requires the jury to believe certain facts which the State's evidence tended to show beyond a reasonable doubt, and then directs the jury that they are authorized to look at these facts, "if they be facts," in connection with all the other evidence in the case, in determining whether or not the defendant assaulted the person named in the indictment, and if he did so assault her, whether or not at that time he had the intent to have sexual intercourse with her against her will and by force, if necessary to accomplish his purpose, and then directs the jury that if they are satisfied beyond a reasonable doubt that the defendant had assaulted said person, and had at the time such intent, he would be guilty of an assault with intent to ravish.—*Jacobi v. State*, 1.

CHARGES OF COURT TO JURY—*Continued.*

2. *Same; same.*—On a trial under an indictment for an assault with intent to forcibly ravish, a charge which instructs the jury that "any touching by one person of the person of another in rudeness or anger is an assault and battery, and every assault and battery includes an assault," is free from error and properly given at the request of the State.
Ib. 1.
3. *Same; general affirmative charge.*—On a trial under an indictment for an assault forcibly to ravish, where there was evidence introduced tending to support every material allegation of the indictment, the general affirmative charge requested by the defendant is properly refused.—*Ib.* 1.
4. *Same; charge to the jury.*—On a trial under an indictment for an assault with intent to forcibly ravish, a charge is erroneous and properly refused which instructs the jury that "in a charge to commit rape, the evidence, to be sufficient to justify conviction, must show such acts and conduct on the part of the defendant, that there is no reasonable doubt of his intention to gratify his lustful desire, notwithstanding any resistance on the part of the female," such instruction assuming that the charge contained in the indictment against the defendant was rape.—*Ib.* 1.
5. *Same; same.*—In such a case, the court properly refused the following charge requested by the defendant: "Before the jury can find the defendant guilty of an assault to ravish in this case, the jury must believe from the evidence, beyond all reasonable doubt that it was the purpose of the defendant to fully accomplish his purpose in such a manner and by such means that, if accomplished, it would be rape; that is, there must be an intent to use force, terror, intimidation and the like, necessary to accomplish the purpose;" such charge having omitted an important word and also being unsound, in that it was not essential to the crime of an assault with intent to ravish that the perpetrator should have the intent that his accomplished purpose should be rape.—*Ib.* 1.
6. *Same; same.*—In such a case the following charge requested by the defendant was properly refused: "The court charges the jury that the State is required to show by evidence, beyond a reasonable doubt and to a moral certainty, the existence of every fact necessary to establish the guilt of the defendant before he can be convicted. If from all the evidence to be proved"; said charge being incomplete on its face,
Ib. 1.
7. *Abstract charges* are properly refused.—*Ib.* 1.
8. *Homicide; charge as to reasonable doubt.*—On a trial under an indictment for murder, a charge is free from error and properly given at the request of the State which instructs the jury that "a doubt, to acquit the defendant, must be actual and substantial, not mere possibility or speculation. It is not a mere possibility or possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt."—*Jimmerson v. State*, 18.
9. *Same; same.*—In such a case a charge is erroneous and properly refused which instructs the jury that "if they believe from all the evidence in this case that there existed in the mind of the defendant at the time he fired the fatal shot, a reasonable apprehension of imminent danger to his life or limb, then the defendant could lawfully act upon appearances and

CHARGES OF COURT TO JURY—*Continued.*

- kill the deceased, if the defendant was without fault in bringing on the difficulty."—*Ib.* 18.
10. *Same; same.*—In such a case a charge is erroneous and properly refused which instructs the jury that "if there be a single juror who has a reasonable doubt of the guilt of the defendant, growing up out of the evidence in this case, the jury should acquit the defendant."—*Ib.* 18.
 11. *Same; same.*—In such a case a charge is erroneous and properly refused which instructs the jury that "a reasonable doubt, is a doubt growing up out of all the evidence in the case for which you can give a reason, and, if there is a reasonable doubt of defendant's guilt, the jury should acquit the defendant."—*Ib.* 18.
 12. *Same; charge as to self defense.*—On a trial under an indictment for murder, a charge which instructs the jury that "an apprehension of imminent danger caused by acts or demonstrations by the deceased or by threats or words coupled with acts or declarations, is sufficient to justify a deadly assault upon the deceased," is erroneous and properly refused.—*Ib.* 18.
 13. *Same; same.*—In such a case, a charge as to self defense, which fails to hypothesize a reasonable belief by defendant that he was in imminent peril, is erroneous and properly refused. *Ib.* 18.
 14. *Same; charge as to character of deceased.*—On a trial under an indictment for murder, where the character of the deceased had not been assailed by the defendant, but the State had been allowed to prove, against the defendant's objection, that the general character of the deceased for peace and quiet was good, a charge which instructs the jury that they can not consider any evidence showing or tending to show that the deceased was a man of good character for peace and quiet, is free from error and should be given at the request of the defendant.—*Ib.* 18.
 15. *Homicide; charge of court to jury.*—On a trial of two defendants under an indictment for murder, where there is evidence tending to show that there was a conspiracy existing between the defendants to kill the deceased, and that one of the defendants did not shoot at the deceased at all, a charge which instructs the jury that the other defendant had the same right to act in self defense as if he had been first attacked, even though the evidence shows that the deceased had attacked his brother and he had interfered to prevent the deceased from further attacking him, is erroneous and properly refused.—*Stevens v. State*, 28.
 16. *Same; same.*—In such a case, a charge is free from error which instructs the jury that "if you believe from the evidence beyond a reasonable doubt that there was a conspiracy between the defendants and the father to take the life of Vester Henson [the deceased] or do him great injury and the father of defendants fired the fatal shot that killed the deceased, then they would be equally guilty with the father, if the shooting by the father was done in carrying out the conspiracy previously entered into by him."—*Ib.* 28.
 17. *Same; same.*—In such a case, it is not error for the court to instruct the jury as a part of its oral charge that "if you believe from the evidence beyond a reasonable doubt that these defendants entered into a conspiracy to kill the deceased, and the deceased was killed with a pistol, you would find them guilty of murder in the second degree, if it was done unlawfully and with malice."—*Ib.* 28.

CHARGES OF COURT TO JURY—*Continued.*

18. *Same; same.*—In such a case, where there was evidence tending to show that while there were several shots fired at the deceased by the defendants with pistols, that the fatal shot was fired by the father of the defendant from a rifle, and that there was a conspiracy between the defendants and their father to kill the deceased, a charge which instructs the jury that if they believe that the deceased "was killed by a shot from a rifle and not with a pistol, you must acquit the defendants," is erroneous, in that it pretermits all reference to a conspiracy.—*Ib.* 28.
19. *Homicide; charge as to self defense.*—On a trial under an indictment for murder, a charge which instructs the jury that "in order to invoke the doctrine of self defense defendants must have been free from fault in bringing on the difficulty—reasonably free from fault will not do," is free from error.—*Ib.* 28.
20. *Homicide; charge to the jury.*—On a trial for murder, where both the evidence for the State and for the defendant prove that the homicide was committed by the defendant, a charge requested by the defendant is erroneous and properly refused which instructs the jury that "they must believe beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged in the indictment, to the exclusion of every probability of his innocence and every reasonable doubt of his guilt; and that if the prosecution has failed to furnish such measure of proof and to impress the jury with such belief of his guilt, they should find him not guilty."—*Johnson v. State*, 38.
21. *Same; same.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if the defendant killed the deceased in the heat of passion aroused by sudden anger produced by the resistance of the boy being chastised, then the killing would not be murder unless at the time of the shooting the defendant was prompted by a willful, intentional, malicious and premeditated design to take the life of the deceased, and if every reasonable hypothesis of the innocence of the defendant is not broken down, the crime of murder is not made out."—*Ib.* 38.
22. *Same; same.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if they believe from the evidence that the killing in the case was not malicious, then the defendant would not be guilty of murder in either, and that if the killing in this case was without malice, then the defendant would not be guilty of a higher offense than manslaughter in the first degree, and that if after considering all the evidence the jury have a reasonable doubt of defendant's guilt of manslaughter arising out of any part of the evidence then they should find the defendant not guilty of any offense."—*Ib.* 38.
23. *Same; same.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if defendant was moved by sudden anger or passion provoked by his attempt to chastise his son, the deceased, and the latter's resistance, to fire the gun, but that no malice entered into it, then the defendant could not rightfully be convicted of murder."—*Ib.* 38.
24. *Court's oral charge to jury.*—On a trial under an indictment for murder, where the court in its oral charge to the jury correctly instructs the jury as to what constitutes murder in the first degree, the further instruction to the jury that

CHARGES OF COURT TO JURY—*Continued.*

- "Murder in the second degree is the unlawful and malicious killing of a human being. The distinction between the two degrees of murder is the absence in murder in the second degree of that deliberation and premeditation required in murder in the first degree is free from error.—*Ib.* 38.
25. *Argumentative and misleading charges* are properly refused. *Mitchell v. State*, 65.
 26. *Homicide; charge as to inference to be drawn from flight.*—On a trial under an indictment for murder, where there is evidence tending to show that after the homicide the defendant fled to another county, a charge is erroneous and properly refused which instructs the jury that "Flight of a defendant, although a circumstance to be considered by the jury in connection with all the other evidence, is evidence of a weak and inconclusive character. It may not be evidence of guilt at all if it be shown that there was any other reason for the flight than that of a sense of guilt. Flight may proceed from an unwillingness to stand a public prosecution or from fear of the result, from an inability to explain false appearances, or from the advice of friends, to avoid public excitement, and if it proceeded from any one or more of these reasons, then flight is not evidence of guilt at all."—*Ib.* 65.
 27. *Same; charge as to interest of witness.*—On a trial under an indictment for murder, where the children of the deceased testified as witnesses, a charge is properly refused which instructs the jury that they must weigh the testimony of the children of the deceased "in the light of the fact that they are the children of the deceased, and of the material interest they have in the case."—*Ib.* 65.
 28. *Same; charge as to conspiracy.*—On a trial for murder, where there is evidence tending to show a conspiracy between the defendant and his two sons who were jointly indicted with him, charges are properly refused which instruct the jury that "there is no evidence that the killing in this case was in pursuance of any conspiracy."—*Ib.* 65.
 29. *Same; charge of court to jury.*—On a trial under an indictment for murder, where there is evidence tending to show that the defendant was the aggressor, charges are erroneous and properly refused which instruct the jury that the defendant "is warranted in acting more promptly in his own defense when assailed by a person he knows had made threats at taking his life, than when assailed by one who had made no such threats"; and "when assailed by a man of known violent character, than when assailed by a person of peaceable and law-abiding character."—*Ib.* 65.
 30. *Same; charge as to self-defense.*—On a trial under an indictment for murder, a charge requested by the defendant which does not hypothesize the belief of the defendant that he was in imminent peril at the time of firing the fatal shot, and which does not fully and clearly state the doctrine of imminency of peril and escape therefrom, is properly refused. *Ib.* 65.
 31. *Same; same.*—On a trial under an indictment for murder, where there is evidence tending to show that the defendant was the aggressor, a charge is erroneous and properly refused which assumes that the defendant was free from fault in bringing on the difficulty.—*Ib.* 65.
 32. *Same; same.*—In such a case, a charge is erroneous and properly refused which seeks to impose no duty of retreat on defendant.—*Ib.* 65.

CHARGES OF COURT TO JURY—*Continued.*

33. *Homicide; charge as to self defense.*—On a trial under an indictment for murder, a charge seeking to instruct the jury as to self defense, but which ignores the question as to whether the defendant was impelled to shoot the deceased by the belief reasonably engendered by the circumstances that it was necessary to do so in order to save himself from the then impending danger of great bodily harm, is erroneous and properly refused.—*Richardson v. State*, 78.
34. *Same; general affirmative charge.*—On a trial under an indictment for murder, even though there is no conflict in the evidence, but there is evidence tending to show the defendant bore malice towards the deceased, and was actuated by malice in shooting him, the question as to whether or not the defendant was guilty of murder is one for the determination of the jury, and therefore charges which instruct the jury that if they "believe the evidence they can not find the defendant guilty of murder in the second degree," and that "if the jury believe the evidence in this case they will find the defendant not guilty of murder in the second degree," and that "if the jury believe the evidence in this case they will find the defendant not guilty," are erroneous and properly refused.—*Ib.* 78.
35. *Homicide; charge to the jury.*—On a trial under an indictment for murder, a charge is properly refused as being argumentative which instructs the jury "that any threats made by the deceased towards defendant, if such threats are shown to have been made by deceased, whether recently made or not, may be considered by the jury in connection with all the other evidence in the case, in determining whether or not there was real or apparent danger to defendant at the time he fired the fatal shot."—*Campbell v. State*, 81.
36. *Same; same.*—On a trial under an indictment for murder, where the evidence showed that while the deceased and the father-in-law of the defendant were engaged in an altercation the defendant approached them, and upon his speaking to the deceased there followed the difficulty which resulted in the latter's death, a charge is erroneous and properly refused which instructs the jury "that if the defendant approached the deceased in a quiet and orderly manner, that deceased replied to him in an angry manner, and knocked defendant down, and that defendant reasonably and honestly believed that deceased struck him with a pistol, and reasonably and honestly believed that deceased had a pistol in his hand as defendant arose after he was knocked down and that his purpose was to do defendant serious bodily harm, and the circumstances were such as to reasonably produce such belief in defendant's mind, situated as defendant was at the time, and no reasonable and safe avenue of escape was open to defendant, then defendant had the right to anticipate his assailant and fire first, and this rule would not be changed even though it should turn out that defendant was mistaken as to his belief that deceased had a pistol in his hand."—*Ib.* 81.
37. *Same; same; reasonable doubt.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury "that if, after looking at all the evidence in the case, your minds are left in such a state of uncertainty that you can not say beyond a reasonable doubt whether the defendant was at fault in bringing on the difficulty, and whether he acted upon the well grounded and reasonable belief that it was necessary to shoot and take the life of

CHARGES OF COURT TO JURY—*Continued.*

Arthur York to save himself from great bodily harm or death, or he shot before such impending necessity arose, then this is such a doubt as will entitle the defendant to an acquittal."—*Ib.* 81.

38. *Same; same; same.*—In such a case, a charge is erroneous and properly refused which instructs the jury "that if the testimony points in two directions, one to the guilt of the defendant, and the other to his innocence, and both are equally reasonable, they are bound to accept that which points to his innocence and acquit the defendant, if they believe that phase of the testimony."—*Ib.* 81.
39. *Same; same; same.*—In such a case, a charge is erroneous and properly refused which instructs the jury "that if the testimony shows two theories, one tending to the defendant's guilt and the other to his innocence, and both are reasonable, they must acquit the defendant, if they believe the theory tending to his innocence."—*Ib.* 81.
40. *Homicide; charge as to freedom from fault.*—On a trial under an indictment for murder, charges which do not hypothesize freedom from fault in bringing on the difficulty, or ignore the question of freedom from fault in bringing on the difficulty, are erroneous and properly refused.—*Watkins v. State, Ib.* 88.
41. *Same; charge to the jury.*—On a trial under an indictment for murder, a charge which withholds from the jury the right to determine whether the facts hypothesized were sufficient to show imminent peril to life or limb, is properly refused. *Ib.* 88.
42. *Same; same.*—In the trial of a criminal case, charges which are argumentative, or which lay stress on a particular fact to the exclusion of others, or which are invasive of the province of the jury, are properly refused.—*Ib.* 88.
43. *Same; charge as to reasonable doubt.*—In a criminal case, a charge which predicates reasonable doubt of the defendant's guilt alone upon the defendant's good character, is erroneous and properly refused.—*Ib.* 88.
44. *Same; same.*—In a criminal case, a charge is erroneous and properly refused which instructs the jury that "Before the jury can convict the defendant they must be satisfied to a moral certainty not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and unless the jury are so convinced by the evidence of the defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance as to his own interest, then they must find the defendant not guilty."—*Ib.* 88.
45. *Charge to the jury; properly refused when mere repetition.*—In the trial of a criminal case, it is not error to refuse to give charges which are substantially repetitions of instructions already given by the court.—*Ib.* 88.
46. *Charge of court as to reasonable doubt.*—In the trial of a criminal case, a charge is properly refused as being argumentative, which instructs the jury that "before you can convict the defendant you must be satisfied to a moral certainty not only that the proof is consistent with the guilt of the defendant, but it is wholly inconsistent with every other rational conclusion, and unless you are so convinced by the evidence of the defendant's guilt, that you would each venture to act upon that decision in matters of the highest concern and importance to your own interest, you must find the defendant not guilty."—*Nevill v. State, 99.*

CHARGES OF COURT TO JURY—*Continued.*

47. *Same; propriety of explanatory charge.*—Where a court upon the request of the defendant instructs the jury that "I charge you that the only foundation for a verdict of guilty is that the entire jury shall believe from the evidence beyond a reasonable doubt and to a moral certainty, that the defendant is guilty as charged in the indictment, to the exclusion of every possibility of his innocence and every reasonable doubt of his guilt; and if the State has failed to furnish such measure of proof and to so impress the minds of the jury of his guilt, they should find him not guilty," it is not error for the court by way of explanation to further instruct them orally that "that means, gentlemen, that every member of the jury must believe the defendant is guilty beyond a reasonable doubt before a conviction should be had."—*Ib.* 99. -
48. *Same; same.*—Where the court, at the request of the defendant, instructs the jury that "I charge you to acquit, unless the evidence excludes every reasonable supposition but that of defendant's guilt," it is not error for the court by way of explanation, to further instruct the jury that "that means you must believe defendant's guilt beyond a reasonable doubt, or acquit."—*Ib.* 99.
49. *Same; charge as to reasonable doubt.*—On the trial of a criminal case, a charge given by the court at the request of the State, instructing the jury that "if any one of the jury has a reasonable doubt of the guilt of the defendant, they are not for this reason required to acquit the defendant," is free from error.—*Ib.* 99.
50. *Charge of court to jury; reasonable doubt and probability of innocence.*—In the trial of a criminal case, a charge requested by the defendant which instructs the jury that "a reasonable doubt of defendant's guilt is not the same as a probability of his innocence. A reasonable doubt of defendant's guilt may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence," asserts a correct legal proposition, is not ambiguous, argumentative or misleading, and its refusal is a reversible error. *Stewart v. State*, 105.
51. *Same; self-defense.*—On the trial under an indictment for murder, charges to the jury requested by the defendant which postulate the defendant's acquittal upon the plea of self-defense, without setting out the constituent elements of self-defense, are faulty and properly refused.—*Ib.* 105.
52. *Same; same; burden of proof.*—Under a plea of self-defense, the burden of proof is upon the defendant, and charges which place the burden as to this issue upon the State are erroneous and properly refused.—*Ib.* 105.
53. *Same; homicide.*—On a trial under an indictment for murder, a charge which instructs the jury that "If there is generated in their minds by the evidence in this case, or any part of it, after consideration of the whole evidence by them, a well founded doubt of defendant's guilt of any offense, then the jury must find the defendant not guilty," is erroneous and properly refused.—*Ib.* 105.
54. *Assault with intent to murder; charge of court to jury.*—On a trial under an indictment for an assault with intent to murder, where it is shown that the assault was committed with a shot gun, and that at the time of firing the shot gun the defendant was standing twenty or twenty-five feet from the person assaulted, a charge is erroneous and prop-

CHARGES OF COURT TO JURY—*Continued.*

- erly refused which instructs the jury that "unless the jury are satisfied from the evidence beyond a reasonable doubt that the gun testified as the gun used by the defendant loaded with number six shot, fired at the distance of twenty steps, as testified in this case, was capable of producing the death of George Willis at the time the gun was fired, they can not find the defendant guilty of an assault with intent to murder."—*Christian v. State*, 109.
55. *Homicide; charge as to freedom from fault in bringing on difficulty.*—In a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if they believe from all the evidence that the defendant was reasonably free from fault in bringing on the difficulty, it can not be said that he was responsible for bringing on the difficulty."—*Scott v. State*, 112.
56. *Same; same.*—In such a case, a charge is erroneous and properly refused which instructs the jury that "under the evidence in this case the accused can not be deprived of the right of self-defense under the charge of murder in the indictment, even though the proof shows that the accused was in fault in bringing on the difficulty, unless it be further shown that he intended to bring it on, and to bring it on with felonious intent."—*Ib.* 112.
57. *Same; charge as to good character.*—The good character of a defendant in a criminal case is never of itself sufficient to generate a reasonable doubt of the defendant's guilt; and, therefore, a charge is erroneous and properly refused which instructs the jury that "If they find from the evidence that the defendant is a man of good character, they may consider that character in connection with the other evidence in the case in determining his guilt, and it may generate a reasonable doubt of his guilt."—*Ib.* 112.
58. *Same; charge as to fault in bringing on difficulty.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "If the defendant acted in self-defense in the difficulty at the beginning, and even though he might have renewed it after the deceased retreated, yet if they believe that the defendant did not realize that the deceased had abandoned the difficulty, then they must acquit the defendant."—*Ib.* 112.
59. *Charge as to reasonable doubt.*—In a criminal case, a charge which instructs the jury that in order to convict they must find that "there is no other possible or reasonable conclusion to be reached but that of the defendant's guilt," is erroneous and properly refused.—*White v. State*, 122.
60. *Homicide; conspiracy; charge to the jury.*—On a trial under an indictment for murder, where there was evidence tending to show that the defendant and another party acted in concert in killing the deceased, a charge which instructs the jury that "no matter how strong the circumstances may be in this case, if they can be reconciled with a theory that some other person did the killing charged against the defendant," the jury should acquit him, is erroneous and properly refused.—*Ib.* 122.
61. *Charge relating to argument of counsel properly refused.*—It is not error for the court to refuse to give charges having no other purpose than to respond to or off-set the argument made before the jury by the prosecuting officer.—*Ib.* 122.
62. *Homicide; self defense; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads self defense, charges requested by the defendant, which as-

CHARGES OF COURT TO JURY—*Continued.*

- sume as matter of law that facts postulated therein created imminent peril to life or limb, invade the province of the jury, whose duty it is to determine whether the defendant was in imminent peril, and such charges are properly refused.—*Cawley v. State*, 128.
63. *Same; charge as to reasonable doubt.*—In a criminal case, a charge which instructs the jury that a reasonable doubt "is a doubt for which a reason can be given," is properly refused, being calculated to confuse and mislead the jury. *Ib.* 128.
64. *Same; plea of self defense and insanity; charge to the jury.* On a trial under an indictment for murder, where the defendant pleads not guilty and not guilty by reason of insanity, and the two issues are submitted and tried at the same time, a charge is erroneous and properly refused which instructs the jury that "if the jury believe from the evidence that the defendant committed the act under circumstances which would be criminal or unlawful if he was sane, the verdict should be not guilty, if the killing was an offspring or product of mental disease in the defendant." *Ib.* 128.
65. *Same; self defense; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads self defense, a charge is erroneous and properly refused which instructs the jury that "if the defendant did not provoke or bring on the difficulty, and the deceased advanced upon him drawing his hand from his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw and fire, the defendant was authorized to anticipate him and fire first."—*Ib.* 128.
66. *Same; plea of insanity; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads not guilty by reason of insanity, a charge is erroneous and properly refused which instructs the jury that even if they should believe from the evidence that the defendant at the time of the killing had the capacity to distinguish between right and wrong, "yet if the jury should believe from the evidence that defendant was moved to action by the insane impulse controlling his will or judgment, then he is not guilty of the offense charged."—*Ib.* 128.
67. *Charge to the jury; reasonable doubt.*—In a criminal case, a charge which instructs the jury that "unless the evidence is such as to exclude to a moral certainty every hypothesis but that of the guilt of the defendant of the offense charged in the indictment, you should acquit him," is erroneous and properly refused, in that it omits the word "reasonable" as qualifying "hypothesis."—*Smith v. State*, 145.
68. *Charge as to reasonable doubt.*—On the trial of a criminal case, a charge which instructs the jury that if they "have a reasonable doubt as to the conclusions of the proof of any single fact, which it is necessary for the State to prove, they must acquit the defendant," is confusing and calculated to mislead the jury, and for these reasons is properly refused. *Thomas v. State*, 139.
69. *Charge to the jury; must be complete in itself.*—A charge requested to be given to the jury must be complete in itself; and a charge which instructs the jury that "a reasonable * * * is a doubt which naturally arises in the mind in considering the evidence," is properly refused because it is incomplete.—*Ib.* 139.

CHARGES OF COURT TO JURY—*Continued.*

70. *Charge of court to jury.*—In the trial of a criminal case, a charge which instructs the jury that "the proof of suspicious facts against the accused, does not even require him to rebut it, and the jury can not convict on suspicious facts merely," is erroneous and properly refused, in that it assumes the proof of suspicious facts and at the same time ignores other evidence in the case.—*Ib.* 139.
71. *Reasonable doubt; charge to the jury.*—In a criminal case, a charge which instructs the jury that if they "believe the defendant is guilty from the evidence to a moral certainty," they must convict the defendant, is free from error, and is properly given at the request of the State.—*Bailey v. State*, 155.
72. *Homicide; charge to the jury.*—On a trial under an indictment for murder, where there was evidence tending to show that the defendant recklessly fired a gun into a crowd of negroes, which resulted in the killing of the deceased who was standing near the negroes, a charge which instructs the jury that "Unless, the jury are satisfied from the evidence beyond a reasonable doubt that the defendant fired the gun with the intention to kill a human being, they can not find the defendant guilty of murder in the second degree," is erroneous and properly refused.—*Ib.* 155.
73. *Homicides; charge to the jury.*—On a trial under an indictment for murder, a charge is free from error which instructs the jury that "If the jury have a reasonable doubt as to whether the killing was done deliberately, or as to whether it was done premeditatively, then they can not find the defendant guilty of murder in the first degree, and if they have a reasonable doubt as to whether the killing was done in malice, then they can not find the defendant guilty of murder in either degree, but only manslaughter at most; and if after considering all the evidence, the jury have a reasonable doubt as to defendant's guilt of manslaughter, arising out of all the evidence, then they should find the defendant not guilty of any offense," and such charge should be given at the request of the defendant.—*Adams v. State*, 166.
74. *Same; same; burden of proof.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "The burden of proof is not shifted from the State to the defendant, and the presumption of innocence abides with the defendant, until all the evidence in the cause convinces the jury to a moral certainty that the defendant can not be guiltless." (DOWDELL, J., dissenting.)—*Ib.* 166.
75. *Charge of court to jury; should be clear and certain.*—Charges which the court are requested to give should be expressed in clear, certain and intelligent language; and if not so expressed are properly refused.—*Ib.* 166.
76. *Abstract and argumentative charges* are properly refused.—*Ib.* 166.
77. *Homicide; charge to the jury.*—On a trial under an indictment for murder, where there is evidence tending to show that the defendant brought on the difficulty, a charge is erroneous and properly refused which instructs the jury that "If one assaulted suddenly and under the maddening influence of blows slays his assailant, and there is nothing else in the transaction, this is manslaughter and not murder."—*Ib.* 166.
78. *Same; same; self-defense.*—On a trial under an indictment for murder, charges which hypothesize self-defense in general terms, or which hypothesize one or more elements of self-

CHARGES OF COURT TO JURY—*Continued.*

- defense, and which omit to set out all the constituent elements of self-defense, are erroneous and properly refused. *Ib.* 166.
79. *Selling spirituous liquors; charge of court on the effect of the evidence.*—On a trial under an indictment for selling spirituous, vinous or malt liquors without a license and contrary to law, where the court in its charge to the jury, after instructing them as to what constituted a sale, then charges that the State must show beyond all reasonable doubt that the defendant sold the whiskey in question to the party as alleged, or that not being the owner or interested in it or in the money paid for it, he was acting in the sale for the owner of the whiskey, it is error for the court to further instruct the jury that "there was a sale of the liquor in this case appears from the evidence almost without dispute;" this portion of the charge being upon the effect of the evidence.—*Winter v. State*, 176.
80. *Same; general charge of court to jury.*—In such a case, where in addition to the instructions contained in the general charge as above set out the court further instructed them that in order to convict the defendant they must believe from the evidence beyond all reasonable doubt that he sold the whiskey to the State's witness, or that if he did not own the whiskey he aided and assisted in the sale as the agent of the owner, it is not error for the court to further instruct the jury in its general charge that "if you believe from the evidence beyond all reasonable doubt defendant's conduct was a subterfuge to sell his own whiskey to the witness, then he would be guilty."—*Ib.* 176.
81. *Same; same.*—In such a case, it is not error for the court to instruct the jury in its general charge that "if the defendant had no interest in the whiskey, but if you believe from the evidence beyond all reasonable doubt he was acting as the agent of some one else who owned the whiskey in making a sale to the State's witness, if such sale was made, he is guilty."—*Ib.* 176.
82. *Same; not error to refuse charges which are repetitions of those already given.*—It is not error for the court to refuse charges requested by defendant which are substantially duplicates or a repetition of charges previously given at the request of the defendant.—*Ib.* 176.
83. *Same; charge to the jury.*—On a trial under an indictment for selling spirituous, vinous or malt liquors without a license and contrary to law, a charge is erroneous and properly refused as misleading, which instructs the jury that there is no presumption in this case that the defendant was a man who had liquor to sell;" since the defendant may have properly been found guilty as charged in the indictment, notwithstanding he had no liquor to sell.—*Ib.* 176.
84. *Carrying concealed weapons; when general affirmative charge improperly given.*—Where on a trial of a defendant for carrying a pistol concealed about his person there is no dispute as to the defendant having a pistol on his person, but the evidence is in conflict as to whether such pistol was concealed, the general affirmative charge is improperly given at the request of the State.—*Hampton v. State*, 180.
85. *Charge to the jury; reasonable doubt.*—In a criminal case, a charge which instructs the jury that "if you do not believe the evidence beyond a reasonable doubt you are not required to find the defendant guilty," is erroneous and properly refused.—*Ib.* 180.

CHARGES OF COURT TO JURY—*Continued.*

86. *Carrying concealed weapons; charge to the jury.*—On a trial under a prosecution for carrying a pistol concealed, a charge is erroneous and properly refused which instructs the jury that "if you are satisfied from the evidence that the defendant was carrying the pistol in such a manner that it was observable by ordinary observation, you should find the defendant not guilty."—*Ib.* 180.
87. *Assault and battery; charge to the jury.*—In a prosecution for an assault and battery, where the evidence for the defendant tends to show that the day before the commission of the assault the person assaulted, who was a school teacher, had immoderately whipped the son of the defendant, a charge is erroneous and properly refused which assumes that the defendant might be legally justified in committing the assault and battery, upon the ground that his son had been so punished.—*Walkley v. State*, 183.
88. *Charge of court to jury; when defendant can not complain.* The defendant can not complain of a portion of the oral charge of the court which is too favorable to him, in that it exacts too high a degree of proof.—*McCormack v. State*, 202.
89. *Abstract charges* are properly refused.—*Ib.* 202.
90. *Selling liquor to person of known intemperate habits; charge of court.*—In a prosecution for selling spirituous liquors to a person of known intemperate habits, where the State elects to prosecute for a sale alleged to have been made on August 7, and there was evidence on the part of the defendant tending to show that on August 6 he was returning officer at the general election and did not finish the count until ten o'clock on August 7, when he went to the saloon where the sale was alleged to have been made, and remained there between fifteen and thirty minutes and then went home and slept until six o'clock in the evening, but there was positive evidence on the part of the State that the defendant sold whiskey to a designated person on August 7th, a charge is erroneous and properly refused which instructs the jury that "if you believe from the evidence that defendant was a returning officer of the election on August 7th, and went to the Palace Saloon and between fifteen and thirty minutes went to Pattons or Lands, and then went home and slept until 6 o'clock that evening, your verdict should be for the defendant."—*Ib.* 202.
91. *Action for negligence; charge of court as to failure to call in physician.*—In an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, a charge is erroneous and properly refused which instructs the jury "that if they find from the evidence that no doctor was employed by the plaintiff to treat his alleged injuries, the jury may look to this fact, if found from the evidence to be a fact, as a circumstance tending to show that plaintiff was not seriously hurt at the time and place named in the complaint and evidence."—*Postal Tel. Co. v. Jones*, 217.
92. *Action against telegraph company; inconsistency of court in rulings upon charges requested by defendant.*—In an action by one who was traveling along a public road against a telegraph company, to recover for personal injuries alleged to have been caused by reason of the defendant's negligence in allowing a wire charged with electricity to be or remain on or a short distance above the road, whereby the traveling

CHARGES OF COURT TO JURY—*Continued.*

- public along said road were liable to be injured, there is no inconsistency on the part of the trial court in giving a charge at the request of the defendant which left the jury free to find that the wires, poles and cross arms of defendant's line were not in safe and good condition when they were last inspected, and upon so finding to return a verdict for the plaintiff, and refusing at the request of the defendant the general affirmative charge in its behalf.—*Ib.* 217.
93. *Ejectment; delivery of deed; charge of court to jury.*—In an action of ejectment, where the material question at issue is, whether there was a sufficient delivery of the deed to pass title to the property involved in the suit, and there was evidence introduced from which the jury might have inferred an intention on the part of the grantor to deliver the deed to the grantee named therein, the general affirmative charge requested by either party is properly refused; the intention of the grantor in the transaction being a question of fact to be determined by the jury from the circumstances attendant at the time.—*Fitzpatrick v. Brigman*, 242.
94. *Same; same; same.*—In such a case, a charge is properly refused as being misleading, which would authorize the jury to conclude that the delivery of the deed to the grantee in person was necessary, in order to constitute a delivery thereof. *Ib.* 242.
95. *Charge to the jury; properly refused when giving undue prominence to a particular fact.*—A charge to the jury which singles out and gives undue prominence to a fact of which there is evidence, is erroneous and properly refused; and the infirmity of such a charge is not relieved by the further instruction on the part of the court that such fact was to be considered "along with the balance of the evidence in the case." *Bir. So. R. Co. v. Cuzzart*, 262.
96. *Charge to the jury; properly refused when assuming the truth of the testimony of a particular witness.*—A charge to the jury which assumes as absolutely true the testimony of a particular witness introduced, and the absolute correctness of the opinion of such witness, who was examined as an expert, is properly refused.—*Ib.* 262.
97. *Action against railroad company; charge to the jury.*—In an action against a railroad company by an employee to recover damages for personal injuries, where there was evidence showing that the plaintiff had been continuously at work receiving practically the same wages since the day of the accident, it is not erroneous for the court to refuse to give to the jury charges instructing them that the plaintiff had been able since his injury to earn approximately as much money as he had before.—*Ib.* 262.
98. *Contest of will; when general affirmative charge given as to grounds of contest.*—Where the probate of a will is contested upon several grounds, and there is an entire absence of evidence to support the same by the grounds of contest, it is proper for the court at the request of the proponent to give the general affirmative charge in favor of the proponent as to the grounds which were not supported by any evidence. *Woodroof v. Hundley*, 395.
99. *Same; charge to the jury.*—On the contest of the probate of a will, a charge is erroneous and properly refused which instructs the jury that if they "find from the evidence that it is as reasonable to infer that the alleged attesting witnesses to the paper offered in evidence as the last will of W., deceased, subscribed their names thereto out of her presence, as

CHARGES OF COURT TO JURY—*Continued.*

- that any two of them subscribed their names in her presence, then they may find in favor of the contestant."—*Ib.* 396.
100. *Insurance; general affirmative charge.*—Where in an action on a fire insurance policy which contained a provision for arbitration in the event of disagreement as to the amount of the loss, it is shown that the insured and insurer, upon disagreeing as to the amount of the loss, agreed to a submission to arbitration as provided by said clause, and that each selected an appraiser, who, together selected an umpire as provided for, but there was evidence tending to show that the appraiser selected by the insurer was not disinterested, but had been employed by the insurer in many such cases and manifested an unusual interest in behalf of the insurer, showing a bias in its behalf, it is error to give, in such suit, the general affirmative charge requested by the defendant.—*Hall & Bro. Western Assur. Co.*, 637.

COMMON CARRIER.

1. *Liability of railroad company as common carrier and as warehouseman.*—When a railroad company receives goods for transportation, transports them to the point of destination and informs the consignee of their arrival and affords him a reasonable opportunity to remove them, its duty and liability as a common carrier cease, and if the goods are then left in its custody, its liability for subsequent loss or damage is that of warehouseman only.—*Frederick v. L. & N. R. R. Co.*, 486.
2. *Same; same; when recovery can not be had on a claim against a railroad company as common carrier.*—In an action against a railroad company for the loss of goods, where the complaint declares against the defendant as a common carrier, a recovery can not be had upon proof of the loss which occurred after the defendant's duty and liability as a common carrier had terminated, and while the goods had been left in its custody as a warehouseman.—*Ib.* 486.
3. *Action against railroad company as bailee; burden of proof.*—In an action against a railroad company to recover for the loss of goods, under a count which seeks to recover against the defendant as a voluntary bailee, the burden is upon the plaintiff to show negligence on the part of the defendant; and in the absence of proof showing negligence, the plaintiff is not entitled to recover.—*Ib.* 486.

CONSTITUTIONAL LAW.

1. *Mandamus; Supreme Court has no jurisdiction to issue mandamus directed to board of registrars.*—The Supreme Court has no original jurisdiction to issue a writ of *mandamus* directed to the board of registrars of a county, to compel such board to register the petitioner as an elector; such board of registrars not being one of the jurisdictions which the Supreme Court can, under the constitution (Constitution 1901, § 140), control by original writs.—*Ex parte Giles*, 211.
2. *License; statute imposing such tax on corporations constitutional.* The statute requiring all corporations, foreign and domestic, doing business in this State, not otherwise specially required to pay a license tax, to pay an annual privilege tax graduated by the paid up capital of the corporation, (Code, § 2142, subd. 55), is the exercise of legitimate authority of the legislature, and such statute is valid and not unconstitutional.—*So. Car & F. Co. v. State*, 624.

CONTRACTS.

1. *Action upon a contract; when plaintiff not entitled to recover.*
Where a contract is made, stipulating that a certain reward would be paid to the party named in said contract if he disclosed the whereabouts of a certain designated outlaw, so as to enable the party offering the reward to effect the outlaw's capture, before the party named in the contract, or his assignee, can claim the reward or maintain an action to recover it under the contract, it must be shown that he furnished the information of facts actually in existence, which information in itself was sufficient to lead to, or to enable the promisor to, effect the capture; and the mere furnishing of information, vague and uncertain in character and derived from knowledge of past acts, habits and associations of the outlaw, and which do not directly lead to the capture, does not entitle the party to recover the reward stipulated for in the contract.
Cash v. So. Express Co., 272.
2. *Contract by administrator; when invalid; specific performance.*
One P. died intestate leaving his estate incumbered with a mortgage. Immediately after their appointment, the administrators of the estate of said P. entered into a contract with the mortgagee for the purpose and intention of paying off and discharging the said mortgage indebtedness. The contract so entered into, after specifying the indebtedness of the estate to the mortgagee in a large amount and that it was evidenced by promissory notes and secured by a mortgage upon the lands of the estate, and further reciting that the mortgagee had agreed to extend the payment, stipulated on the part of the mortgagors, that they would, for a period of seven years, up to the time of the extension agreed to by the mortgagee, turn over to and pay unto the mortgagee all the rents, incomes and profits from the intestate's estate, which were to be used to pay and satisfy first the advances agreed to be made by the mortgagee from year to year during the period stipulated, and then to be used towards the payment and satisfaction of the mortgage debt due by the intestate to the mortgagee. *Held*: That the administrators were without authority to enter into such a contract; that said contract was not binding upon the estate of the intestate, was invalid and could not be specifically enforced against the administrators in their representative capacity.—*Winston Jones & Co. v. Peebles*, 290.
3. *Mortgage to secure advances of money paid for mortgagor; when modification binding.*—Where the surety on a bona fide executes a note and mortgage to his co-surety for the purpose of securing the latter, in the payment of one-half of a designated amount to be paid by him in effecting the compromise of a judgment rendered against them, and the plaintiff in said judgment declines to accept said amount, it is competent for the mortgagor and mortgagee to modify the agreement so as to change the application of the money provided for by the note and mortgage; and upon the mortgagee subsequently effecting a compromise of said judgment by paying a larger amount than the sum stipulated in said mortgage, which was done with the mortgagor's consent and approval, said note and mortgage constitute a valid and binding obligation, and the consideration therefor did not fail and the mortgage thereby become extinguished when the first offer of compromise was rejected and the sum returned to the mortgagee.
Sheats v. Scott, 642.
4. *Rescission of contract; offer to do equity.*—While a bill for rescission must ordinarily offer to do equity by putting the

CONTRACTS—Continued.

- party against whom the rescission is directed *in statu quo* or returning to him the consideration with interest, if such party has been reimbursed of his expenditure by what he has received under the contract sought to be rescinded, such offer to do equity is not necessary to authorize the maintenance of the bill.—*Walling v. Thomas*, 426.
5. *Railroad company; effect of agreement with land owner to build and maintain fences and cattle guards.*—An agreement by a railroad company with a land owner that it will build and maintain fences and cattle guards in consideration of the latter's grant of a right of way, is *prima facie* binding on the company to pay the land owner for injuries to stock entering on the track of the railroad company in consequence of the company's failure to maintain the fences and cattle guards in accordance with the terms of the contract. *Evans v. So. R. Co.*, 482.
6. *Same; same; action for breach thereof.*—In an action against a railroad company to recover damages to the plaintiff's stock, resulting from the breach of a contract entered into between the plaintiff and the defendant, by which the railroad company agreed to build and maintain fences and cattle guards through the land of the plaintiff, it is necessary for the complaint to aver when the contract was first broken, since the breaches may be several and continuous.—*Ib.* 482.
7. *Duress of goods; when party entitled to cancellation of contract.* When the possession of one's goods is unlawfully held against him, and he has such an important, urgent and immediate occasion for their possession and use as can not be subserved by a resort to the courts to recover them, he may avoid any contract he enters into with the wrongdoer, in order to regain possession of his goods; the duress of the goods under such circumstances rendering the contract invalid.—*Glass & Co. v. Haygood*, 489.

CITY COURTS.

See COURTS, SUB-TITLE.

CODE.

- § 314. Claims against insolvent estate; objections thereto; issue and trial.—*Christopher v. Stewart*, 348.
- § 434. Appeals from order on motion for new trial; does not apply to decrees of probate court.—*Beatty v. Hobson*, 270.
- § 458. Appeals from probate court; what decree will support an appeal.—*Christopher v. Stewart*, 348.
- § 484. Appeals from judgment by justice of the peace; what papers necessary to be returned to clerk.—*Hardee v. Abraham*, 341.
- §§ 616-617. Bill of exceptions; when signed after adjournment of term the order of court or agreement of parties must be shown by the record.—*Andrews v. Meadow*, 442.
- § 894. Suit against endorser; excuse for not suing to first term of court.—*Brown v. Fowler*, 310.
- § 1462. Distribution of personal estate.—*Nolen v. Doss*, 259.
- § 1477. Detinue; suit by mortgagee.—*Elston v. Roop & Sewell*, 337.
- § 1749. Employers' Liability Act.—*Bir. Southern R. Co. v. Cuzzart*, 262.
- § 1835. Depositions; must be taken by commissioners named.—*Montgomery St. Ry. Co. v. Mason*, 508.
- § 1883. Executions; void unless itemized bill of costs attached thereto.—*Marks & Gayle v. Wood*, 533.

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- § 2154. Judicial sale; officer's return or report of sale sufficient. *Culli v. House*, 304.
- § 2158. Fraudulent conveyances; when general assignment or conveyance enures to benefit of creditors.—*Russell v. Davis*, 647.
- § 3089. Official bonds; effect of bond not properly executed.—*McKissack v. McClendon*, 558.
- § 3507. Statutory right of redemption; sufficiency of tender.—*Burke v. Brewer*, 389.
- § 3826. Appeals; how decree of chancery court considered.—*Shows v. Folmar Sons & Co.*, 599.
- § 4122, subd. 55. License tax on corporations; constitutional. *Southern Car & Foundry Co. v. State*, 624.
- § 4137. Statutory penalty for cutting trees; no exemptions allowed against judgment therefor.—*Crawford v. Slaton*, 393.
- § 4143. Claim suit; sufficiency of verdict assessing value of property.—*Massillon Engine & Thresher Co. v. Arnold*, 368.
- § 4333. Error without injury in criminal cases; will not work reversal.—*Lide v. State*, 43.
- § 4659. Embezzlement by clerk, agent or servant; constituents of offense.—*Grider v. State*, 188.
- §§ 4792-4797. Gaming; when house where game played within the statute.—*Kicker v. State*, 193; *James v. State*, 208.
- § 5000. Organization of special grand jury.—*Lide v. State*, 43.
- § 5004. Organization of jury; how special jury in capital case drawn and summoned.—*Cawley v. State*, 128; *Adams v. State*, 166.
- § 5005. What constitutes venire for trial of capital case.—*Adams v. State*, 166.
- § 5007. Mistake in juror's name no cause to quash venire.—*Cawley v. State*, 128.
- § 5009. Manner of drawing special jury; talesmen.—*Adams v. State*, 166.
- § 5016. Organization of jury; challenge for cause.—*Charleston v. State*, 118.
- § 5087. Taking or soliciting orders for liquors to be shipped in prohibition district.—*Levy v. State*, 190.
- § 5273. Service of copy of indictment and list of jurors on defendant in capital case.—*Cawley v. State*, 128.
- Page 1201, Rule 33. Bill of exceptions; proper preparation.—*Southern R. Co. v. Jackson*, 384.
- Page 1205. Rule 19, Chancery practice; when not necessary to make all parties interested parties to bill.—*Noble v. Gadsden L. & I. Co.*, 250.

CORPORATIONS.

1. *Corporations; right of minority stockholder to maintain bill to distribute assets of corporation.*—When a private business corporation, though solvent, in that it owes no debts, is a failure, and the purposes for which it was organized are impossible of attainment, and its assets are being gradually sacrificed in the payment of taxes and expenses, the minority stockholders of such corporation can maintain a bill in equity to have the corporate assets sold and the proceeds thereof distributed among the stockholders.—*Noble v. Gadsden L. & I. Co.*, 250.
2. *Evidence; admissibility of paper signed by directors of corporation.*—A writing signed by directors of a corporation, reciting the meeting of the board and stating that by unanimous consent of the board of directors, the corporate assets were sold to a designated person and authorizing the president of

CORPORATIONS—*Continued.*

the corporation to transfer all of the corporation's interest in its assets to said person, is admissible as evidence of a sale and the authority of the president to make the transfer in behalf of the corporation, in connection with a by-law of the corporation providing that the corporate powers of the company were vested in the board of directors, and the oral testimony of the president that said sale and transfer were made. *Clem v. Wise*, 403.

3. *License tax; sale by one corporation to another does not assign a license.*—The purchase of the stock, property and business of one corporation by another corporation, does not authorize the latter company to do business under a license issued to the former company, nor is the latter company entitled to be credited to the amount of the license tax paid by the selling company on a license tax acquired by the buying company for the years in which the purchase is made. *So. Car & F. Co. v. State*, 624.
4. *Same; statute imposing such tax on corporations constitutional.* The statute requiring all corporations, foreign and domestic, doing business in this State, not otherwise specially required to pay a license tax, to pay an annual privilege tax graduated by the paid up capital of the corporation, (Code, § 4122, subd. 55), is the exercise of legitimate authority of the legislature, and such statute is valid and not unconstitutional.—*Id.* 624.

MUNICIPAL CORPORATIONS.

5. *Nuisance; municipal authorities can not grant the right to maintain public nuisance.*—The authorities of a municipality have no power to authorize the encroachment upon a sidewalk by the erection and maintenance thereon of a part of a building; and it is not a condition precedent to the maintenance of a bill to enjoin the erection and maintenance of such obstruction, that the complainant, who owned the adjacent or co-terminous building had applied, without success, to the authorities of the city for relief.—*First Nat. Bank v. Tyson*, 459.
6. *Municipal corporation; construction of charter as to power of paving.*—The section of a city charter which provides "that it shall be lawful for said city council from time to time and in such manner as it may determine, to pave, gravel, or macadamize any street, avenue, square, public place or alley in whole or in part within the corporate limits or said city, whenever said city council may deem it necessary or expedient to do so; and for that purpose said city council is hereby authorized and empowered to adopt and provide the means therefor," is sufficiently comprehensive to include and authorize side-walk paving; the term "street" in such connection applying to the whole thoroughfare, including the sidewalk.—*City Council of Montgomery v. Foster*, 587.
7. *Same; assessment for street paving must be in proportion to benefit to abutting property.*—No municipal corporation can, under the constitution, make any assessment for the costs of sidewalk or street paving, or for the costs of the construction of any sewers or the placing of curbing on a sidewalk, against the property abutting on such street or sidewalk so paved or drained, in excess of the increased value of such property, by reason of the special benefits derived from such improvements; and an assessment of the costs of paving levied against the adjacent property without reference to the extent of the benefit to the property, is invalid, will be vacated, and the costs of paving so assessed can not be collected. (McClellan, C. J., dissenting.)—*Id.* 587.

CORPORATIONS—*Continued.*

8. *Ordinance of municipality for disturbing religious worship; validity thereof.*—The ordinance of a city which provides that "any person who interrupts or disturbs any congregation or assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior," etc., "must, on conviction, be fined not less than one nor more than one hundred dollars," is not in conflict with the statute of the State defining the offense of disturbing an assemblage met for religious worship; but the passage of such ordinance is the valid exercise of the powers conferred upon said city under a charter giving it authority to preserve the peace and good order of the city; nor is such ordinance unreasonable.—*Mayor and Ald. v. Fitzpatrick*, 613.
9. *Action by city to recover fine imposed by mayor; complaint not demurrable for claiming amount paid.*—Where, on an appeal taken from a conviction before the mayor for the violation of a city ordinance, a complaint is filed by the city, the fact that in such complaint the city claimed the amount of the fine imposed on the defendant by the mayor, does not render it demurrable.—*Id.* 613.

COSTS.

1. *Executions; statute requiring itemized statement of bill of costs applicable to alias and pluries writ.*—The statute requiring that executions shall contain an itemized statement of the bill of costs (Code, § 1883), applies to *alias* and *pluries* writs of execution, as well as original executions; and all executions without such itemized statement of the bill of costs are illegal and void.—*Marks & Gayle v. Wood*, 533.
2. *Same; when items of cost insufficient.*—The statement of costs attached to an execution as follows: "Clerk's fees, * * *; fees on former *fl. fa.*, \$5.75; * * *; Sheriff's fees, * * *; fees on former *fl. fa.*, \$2.05," is not the statement of the several items composing the bill of costs as required by the statute (Code, § 1883); and an execution to which such statement is attached is illegal and void, and the levy of such execution is likewise void.—*Id.* 533.

COTENANCY AND COTENANTS.

See TENANTS IN COMMON.

COURTS.

I. CITY COURTS.

1. *City court of Montgomery; power as to organization of juries.* Although the city court of Montgomery is an inferior court, and of statutory creation, it is, in all criminal matters, a court of general jurisdiction; and in the organization of grand and petit juries for the administration of the criminal law, it possesses like powers to those conferred by the statutes upon circuit courts.—*Lide v. State*, 43.
2. *Same; organization of special grand jury.*—Section 5000 of the Code, providing for the organization of a special grand jury during the session of the court after the grand jury has been discharged, is not repealed, so far as Montgomery county is concerned, by the act of the General Assembly creating the city court of Montgomery and the local statutes enacted for the selection and drawing of juries for Montgomery county; and where, during the term of the city court, after the regular grand jury for such term has been discharged, an offense is committed in Montgomery county, the city court

COURTS—Continued.

has authority and power, under said statute (Code, § 5000), to organize a special grand jury for the investigation of the offense.—*Ib.* 43.

3. *Same; same.*—In the organization of a special grand jury by the city court of Montgomery, under the provisions of the statute providing therefor (Code, § 5000), where the order commands "the sheriff forthwith to summon eighteen persons possessing the requisite qualifications of grand jurors," it is no objection to an indictment preferred by the grand jury so organized, that the sheriff did not select the names of the persons summoned by him, in obedience to the orders of the court, from the jury list which is required to be kept in the office of the judge of probate by the special jury law for Montgomery county.—*Ib.* 43.

II. PROBATE COURT.

4. *Appeal from probate court; when bill of exceptions should be stricken from the record.*—Where the bill of exceptions in a cause tried in the probate court is not signed until after the expiration of the ten days from the date of the decree or judgment, and there is no order made by the court allowing said bill of exceptions to be signed after the expiration of the ten days, and no agreement by counsel in writing to such effect, such bill of exceptions will not be considered by the Supreme Court on appeal, but will be stricken from the record on motion properly made.—*Beatty v. Hobson*, 270.
5. *Same; judgment upon motion for new trial not revisable.*—The statute allowing appeals from judgments granting or refusing to grant motions for a new trial, applies only to civil causes in the circuit and city courts, (Code, § 434); and, therefore, the action of the probate court in overruling and refusing to grant a motion for a new trial in a cause pending in such court is not revisable on appeal.—*Ib.* 270.

III. SUPREME COURT.

6. *Mandamus; Supreme Court has no jurisdiction to issue mandamus directed to board of registrars.*—The Supreme Court has no original jurisdiction to issue a writ of *mandamus* directed to the board of registrars of a county, to compel such board to register the petitioner as an elector; such board of registrars not being one of the jurisdictions which the Supreme Court can, under the constitution (Constitution 1901, § 140), control by original writs.—*Ex parte Giles*, 211.

CRIMINAL LAW.

I. ADULTERY.

1. *Adultery; admissibility of evidence; competency of husband of woman as witness.*—On the trial of a man under an indictment for adultery, the husband of the woman with whom the defendant was charged with having lived in a state of adultery, and who was separately indicted for the same offense, is a competent witness to prove the unlawful cohabitation between his wife and the defendant.—*Campbell v. State*, 158.
2. *Same; admissibility of evidence.*—On a trial of a man under an indictment for adultery, where the husband of the woman with whom the defendant is charged with having lived in a state of adultery testifies to facts showing the commission by the defendant of the offense charged, and further testified to privileged communications between himself and his wife

CRIMINAL LAW—Continued.

tending to show a state of enmity or alienation on the part of the wife, brought about by the defendant's presence in his house, it is competent for the husband of the woman to further testify that during such conversation between himself and his wife the defendant, who was in an adjoining room, and who overheard such conversation, laughed out loud thereat.—*Ib.* 158.

II. ASSAULT AND BATTERY.

3. *Assault and battery; charge to the jury.*—In a prosecution for an assault and battery, where the evidence for the defendant tends to show that the day before the commission of the assault the person assaulted, who was a school teacher, had immoderately whipped the son of the defendant, a charge is erroneous and properly refused which assumes that the defendant might be legally justified in committing the assault and battery, upon the ground that his son had been so punished.—*Waikley v. State*, 183.

III. ASSAULT WITH INTENT TO MURDER.

4. *Assault with intent to murder; charge of court to jury.*—On a trial under an indictment for an assault with intent to murder, where it is shown that the assault was committed with a shot gun, and that at the time of firing the shot gun the defendant was standing twenty or twenty-five feet from the person assaulted, a charge is erroneous and properly refused which instructs the jury that: "unless the jury are satisfied from the evidence beyond a reasonable doubt that the gun testified as the gun used by the defendant loaded with number six shot, fired at the distance of twenty steps, as testified in this case, was capable of producing the death of George Willis at the time the gun was fired, they can not find the defendant guilty of an assault with intent to murder."—*Christian v. State*, 109.

IV. ASSAULT WITH INTENT TO RAVISH.

5. *Assault with intent to rape; charge to the jury.*—On a trial under an indictment for an assault with intent to rape, a charge is not improperly given at the request of the State, which requires the jury to believe certain facts which the State's evidence tended to show beyond a reasonable doubt, and then directs the jury that they are authorized to look at these facts, "if they be facts," in connection with all the other evidence in the case, in determining whether or not the defendant assaulted the person named in the indictment, and if he did so assault her, whether or not at that time he had the intent to have sexual intercourse with her against her will and by force, if necessary to accomplish his purpose, and then directs the jury that if they are satisfied beyond a reasonable doubt that the defendant had assaulted said person, and had at the time such intent, he would be guilty of an assault with intent to ravish.—*Jacobi v. State*, 1.
6. *Same; same.*—On a trial under an indictment for an assault with intent to forcibly ravish, a charge which instructs the jury that "any touching by one person of the person of another in rudeness or anger is an assault and battery, and every assault and battery includes an assault," is free from error and properly given at the request of the State.
Ib. 1.
7. *Same; general affirmative charge.*—On a trial under an indictment for an assault forcibly to ravish, where there was evi-

CRIMINAL LAW—*Continued.*

- dence introduced tending to support every material allegation of the indictment, the general affirmative charge requested by the defendant is properly refused.—*Ib.* 1.
8. *Same; charge to the jury.*—On a trial under an indictment for an assault with intent to forcibly ravish, a charge is erroneous and properly refused which instructs the jury that "in a charge to commit rape, the evidence, to be sufficient to justify conviction, must show such acts and conduct on the part of the defendant, that there is no reasonable doubt of his intention to gratify his lustful desire, notwithstanding any resistance on the part of the female," such instruction assuming that the charge contained in the indictment against the defendant was rape.—*Ib.* 1.
9. *Same; same.*—In such a case, the court properly refused the following charge requested by the defendant: "Before the jury can find the defendant guilty of an assault to ravish in this case, the jury must believe from the evidence, beyond all reasonable doubt that it was the purpose of the defendant to fully accomplish his purpose in such a manner and by such means that, if accomplished, it would be rape; that is, there must be an intent to use force, terror, intimidation and the like, necessary to accomplish the purpose;" such charge having omitted an important word and also being unsound, in that it was not essential to the crime of an assault with intent to ravish that the perpetrator should have the intent that his accomplished purpose should be rape.—*Ib.* 1.
10. *Same; same.*—In such a case the following charge requested by the defendant was properly refused: "The court charges the jury that the State is required to show by evidence, beyond a reasonable doubt and to a moral certainty, the existence of every fact necessary to establish the guilt of the defendant before he can be convicted. If from all the evidence to be proved"; said charge being incomplete on its face, *Ib.* 1.
11. *Same; admissibility of evidence.*—In such a case, a statement by the woman assaulted, after the former trial, that she "had rather die than go back to another trial and go through the same ordeal," is admissible in evidence in connection with the inquiry as to whether or not her absence from the second trial was of a permanent or indefinite nature. *Ib.* 1.

V. BASTARDY.

12. *Bastardy proceeding; competent to make profert of child before the jury.*—In a bastardy proceeding, it is competent for the State to make profert of the bastard child before the jury, for the purpose of showing its resemblance to the defendant.—*Kelly v. State*, 195.
13. *Same; evidence of prosecutrix's association with other men.* On a trial in a bastardy proceeding, where the State has proven the defendant's association with the prosecutrix about the probable date of conception, it is competent for the defendant to introduce evidence showing that about the same time the prosecutrix associated with other men, particularly with a certain named man on an occasion and under circumstances affording opportunity for illicit relations. *Ib.* 195.

VI. CONSPIRACY.

14. *Conspiracy; admissibility in evidence of acts and declarations of co-conspirators.*—In a criminal case, the acts and declarations

CRIMINAL LAW—Continued.

of any person other than the defendant, in the absence of the defendant, are admissible in evidence against the defendant, only when there has been introduced evidence, direct or circumstantial, which is *prima facie* sufficient to establish the existence of a conspiracy between the defendant and such other person to commit the offense charged, and there is evidence tending to show that such acts and declarations are in furtherance of the common design to commit such offense.—*Smith v. State*, 73.

15. *Homicide; conspiracy; charge to the jury.*—On a trial under an indictment for murder, where there was evidence tending to show that the defendant and another party acted in concert in killing the deceased, a charge which instructs the jury that "no matter how strong the circumstances may be in this case, if they can be reconciled with a theory that some other person did the killing charged against the defendant," the jury should acquit him, is erroneous and properly refused.—*White v. State*, 122.
16. *Evidence; admissibility of declarations and conduct of conspirators.*—When the evidence introduced in a criminal case is such as would justify the jury in reasonably inferring the existence of a conspiracy between the defendant and other persons to commit the crime with which the defendant is charged, the acts, declarations and conduct of the other conspirators, in promotion of the purpose of the conspiracy, or in furtherance of the common design to commit the crime, are competent and admissible as evidence against the defendant.—*Thomas v. State*, 139.

VII. CORPUS DELICTI.

17. *Larceny; corpus delicti; admissibility of evidence.*—On a trial under an indictment for larceny, until the State has, by positive or circumstantial evidence, shown a *prima facie* larceny of the property described in the indictment—introduced evidence tending to establish the *corpus delicti*—which is a question for the determination of the court, evidence of the possession by the defendant of the goods alleged to have been stolen is inadmissible.—*Smith v. State*, 145.
18. *Same; same; same.*—On a trial under an indictment for larceny, if the evidence introduced affords inference of the larceny of the goods alleged to have been stolen, the question of its sufficiency is for the determination of the jury, and it is for the jury to determine whether the *corpus delicti* has been proven; and in such a case evidence of possession by the defendant of goods of the same kind as those charged to have been stolen is competent and admissible.—*Ib.* 145.

VIII. CRIMINAL PROCEDURE.

See PLEAS AND DEFENSES, and TRIAL AND ITS INCIDENTS.

IX. EMBEZZLEMENT.

19. *Embezzlement; what necessary to constitute statutory offense.* In order to sustain a conviction for the offense of embezzlement by a clerk or agent under the statute (Code, § 4659) it must be proved (1) that the accused was the clerk, agent, servant or apprentice of a private person; (2) that the money came into his possession by virtue of his employment; (3) that he embezzled or fraudulently converted it to his own use or fraudulently secured it with the intent to convert it to his own use; and on a trial under an indictment for embezzle-

CRIMINAL LAW—Continued.

ment, where there is no evidence tending to show that the defendant either received, from or for his employer, any money which he could possibly convert or embezzle, the defendant can not be convicted.—*Grider v. State*, 188.

X. EVIDENCE.

20. *Evidence; when secondary evidence of testimony of absent witness admissible.*—When a witness has removed from the State permanently or for an indefinite time, his testimony on any former trial of the defendant for the same offense may be given in evidence against the defendant on any subsequent trial.—*Jacobi v. State*, 1.
21. *Same; same; case at bar.*—On a trial under an indictment for an assault with intent to rape, it was shown that upon a former trial of the defendant for the same offense there was a mistrial; that the woman alleged to have been assaulted was present and testified on the former trial; but that she was not present at the second trial. The return of the officer on the subpoena issued for the woman assaulted showed that she could not be found in the county of her former residence, which was the only residence there was any evidence tending to show she ever had in the State. It was shown that she was not married, and had always resided with her mother. A brother of said witness testified that his mother's home, where his sister lived, had been broken up after the first trial of the defendant, and his mother had moved to Georgia, and that his sister had also gone to Georgia, and that a short time before the present trial, he had received a letter from his sister which was written by her in Georgia, where she had been after the removal from this State. Her brother further testified that after the former trial she stated that she would "rather die than go back to another trial and go through the same ordeal." *Held*: That such evidence showed with requisite clearness that said witness was permanently or indefinitely absent from the State at the time of the trial, and that secondary evidence of her testimony on the former trial was admissible.—*Ib.* 1.
22. *Same; admissibility of evidence.*—In such a case, a statement by the woman assaulted, after the former trial, that she "had rather die than go back to another trial and go through the same ordeal," is admissible in evidence in connection with the inquiry as to whether or not her absence from the second trial was of a permanent or indefinite nature.—*Ib.* 1.
23. *Homicide; admissibility in evidence of facts relating to previous difficulty.*—On a trial under an indictment for murder, testimony as to particulars of a former difficulty and relating to occurrences happening to the deceased and the defendant some two months prior to the homicide, and which have no immediate connection with the fatal attack by the defendant on the deceased, is irrelevant, immaterial, incompetent, and inadmissible in evidence.—*Jimmerson v. State*, 18.
24. *Same; admissibility of evidence.*—On a trial under an indictment for murder, where there was evidence tending to show that the deceased had had improper and illicit relations with the defendant's wife, upon the cross examination of the defendant as a witness, a question by the solicitor if he had not heard that the deceased was about to move from the neighborhood is not subject to the objection that the evidence sought to be adduced thereby was immaterial and irrelevant. *Ib.* 18.

CRIMINAL LAW—*Continued.*

25. *Same; evidence as to character of deceased.*—On a trial under an indictment for murder, where the character of the deceased had not been assailed by the defendant, it is not competent for the State to introduce evidence to show that the character of the deceased was good, and that his character for peace and quiet was good.—*Ib.* 18.
26. *Same; admissibility of evidence.*—On a trial under an indictment for murder, where the defendant was allowed to prove that he had sworn out a warrant against the deceased and that at the time of the killing the deceased was under bond to appear and answer any charge that might be preferred against him by the grand jury, it is not competent for the defendant to further prove that he had sworn out the warrant "under the advice of counsel."—*Ib.* 18.
27. *Homicide; conspiracy; admissibility of evidence.*—On a trial under an indictment for murder, where it is shown that the killing occurred just after a suit between the defendants' mother and the deceased had been continued, and there was evidence tending to show a conspiracy between the defendants, their father and their brother-in-law to kill the deceased, it is competent for the State to show that just before the continuance of the case, when the defendants' mother asked for subpoenas for witnesses, the brother-in-law of the defendants stated to the justice before whom the case was pending that he need not issue the subpoenas, that "we intend to fix it up in our own way;" it being shown that just after this statement the deceased walked out of the room with the defendants and their said brother-in-law and the killing occurred a few minutes afterwards.—*Stevens v. State*, 28.
28. *Same; same; same.*—In such a case, where it is shown that on the night before the killing, the defendants staid at the house of their brother-in-law, who went with them the next day to the trial, and where the brother-in-law, on the direct examination, testified that there was no conspiracy between him and the defendants, it is competent for the State to ask him on cross examination, as to whether or not on the evening of the killing, he told a certain named person that the defendants would be at the place of the trial "and hell would be raised"; and upon the witness denying having made such statement, it is competent for the State, for the purpose of impeachment, to prove by such person that the statement was made by said witness.—*Ib.* 28.
29. *Same; same; same.*—In such a case, after one of the defendants had testified that he was at the place of the difficulty as a witness in the suit pending between his mother and the deceased, and knew what the contract was between his mother and the deceased, it is competent for the State, on cross examination, to ask such defendant what was said in the contract; such question being directed to the credibility of witness' testimony.—*Ib.* 28.
30. *Insanity; burden of proof; reasonable doubt.*—When insanity is set up as a defense in a criminal case, the burden is upon the defendant to establish the insanity to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not justify an acquittal.—*Lide v. State*, 43.
31. *Same; what necessary to justify acquittal.*—When insanity is set up as a defense in a criminal case, the defendant must show by a preponderance of the evidence (1) that at the

CRIMINAL LAW—Continued.

time of the commission of the crime he was afflicted with a disease of the brain, rendering him idiotic or otherwise insane; (2) that being so afflicted he did not know right from wrong as applied to the particular action; (3) if knowing right from wrong, that he had by reason of duress of such mental disease, lost the power to choose between right and wrong, and to avoid doing the act; and (4) that the crime was so connected with such mental disease in the relation of cause and effect as to have been the product of it solely. *Ib.* 43.

32. *Evidence as to character; competency in rebuttal.*—On a trial under an indictment for murder, where the defendant has introduced evidence tending to show that the deceased was a man of violent and bloodthirsty character, it is competent for the State, in rebuttal, to show by a witness that the deceased was "a good, fair, average man."—*Mitchell v. State*, 65.
33. *Dying declarations; admissibility of portions thereof.*—The statement in a dying declaration that the defendant "was trying to shoot me [the deceased] at the same time" is the statement of a collective fact, the weight and credibility of which is for the determination of the jury; and such statement is not subject to the objection that it was merely a statement of an opinion or conclusion of the deceased. *Smith v. State*, 73.
34. *Conspiracy; admissibility in evidence of acts and declarations of co-conspirators.*—In a criminal case, the acts and declarations of any person other than the defendant, in the absence of the defendant, are admissible in evidence against the defendant, only when there has been introduced evidence, direct or circumstantial, which is *prima facie* sufficient to establish the existence of a conspiracy between the defendant and such other person to commit the offense charged, and there is evidence tending to show that such acts and declarations are in furtherance of the common design to commit such offense.—*Ib.* 73.
35. *Homicide; admissibility of evidence as to threats.*—On a trial under an indictment for murder, where it is shown that the killing occurred early Tuesday morning, testimony that on the Monday before the killing the defendant threatened to kill the deceased, is admissible as tending to show that the defendant bore malice towards the deceased and was actuated by malice in killing him.—*Richardson v. State*, 78.
36. *Evidence; admissibility of declarations as part of res gestae.* When evidence of an act is in itself competent and admissible as a material fact in the case and is so admitted, the declarations accompanying and characterizing such act become and form a part of the *res gestae* of such act, and as such are admissible in evidence as explanatory thereof. *Campbell v. State*, 81.
37. *Same; same; case at bar.*—On a trial under an indictment for murder, where it is shown that the defendant went to where the deceased and the defendant's father-in-law were engaged in a quarrel, and that the killing ensued as the result of the defendant taking part in the quarrel, after the introduction in evidence of the testimony of witnesses to the fact that the defendant went to the scene of the altercation between the deceased and his father-in-law, it is competent for the defendant to show the declarations made by him upon his starting to the scene of the altercation; such declarations

CRIMINAL LAW—Continued.

- being part of the *res gestae* of his act in going to the place of the altercation.—*Ib.* 81.
38. *Secondary evidence; when admissible.*—Before secondary evidence of what an absent witness had testified on the preliminary hearing is admissible in evidence, a proper predicate must be laid by showing that such witness was either permanently out of the State, with no intention of returning, or was indefinitely beyond the control of the court.—*Watkins v. State*, 88.
 39. *Evidence; motive for particular acts of defendant admissible on his cross-examination.*—While it is not competent for the defendant, who is examined in his own behalf, to testify on direct examination as to his motives in the doing of certain acts, it is permissible, upon the cross-examination of the defendant, to inquire as to his motives for particular acts testified to by him, which were relevant to the issues involved in the case.—*Hurst v. State*, 96.
 40. *Robbery; admissibility of evidence.*—Where two persons are jointly indicted for robbery and a severance is had, and upon the trial of one of them the evidence for the State shows that the offense charged was committed by the defendant's co-defendant pointing a pistol at the person alleged to have been robbed, it is competent for the State to prove that the defendant's co-defendant was seen with a pistol an hour or two before the commission of the alleged robbery; such evidence tending to corroborate the testimony for the State.—*Nevill v. State*, 99.
 41. *Homicide; burden of proof.*—Under a plea of self-defense, the burden of proof is upon the defendant, and charges which place the burden as to this issue upon the State are erroneous and properly refused.—*Stewart v. State*, 105.
 42. *Same; homicide.*—On a trial under an indictment for murder, a charge which instructs the jury that "If there is generated in their minds by the evidence in this case, or any part of it, after consideration of the whole evidence by them, a well founded doubt of defendant's guilt of any offense, then the jury must find the defendant not guilty," is erroneous and properly refused.—*Ib.* 105.
 43. *Confession; when shown to be voluntary.*—On a trial under an indictment for an assault with intent to murder, it was shown that the defendant was arrested by three or four armed men in a house where there were several other people. One of the posse said to the defendant, calling him by name, "We have come after you." The defendant asked "What for?" The officer stated that he knew what for. That thereupon the defendant replied: "Yes, for shooting George Willis [the man alleged in the indictment to have been assaulted]. I did it," and further stated where he was standing at the time he shot said Willis. *Held*: That there was shown to be no promise or threats made to induce or coerce the defendant to make such confession; and that, therefore, there was no error in admitting such testimony.—*Christian v. State*, 109.
 44. *Homicide; admissibility of evidence.*—Where on a trial under an indictment for murder, a physician testified that he had had considerable experience in examining blood spots, and had examined the defendant's leggings which were worn by him on the day of the homicide, it is competent for such witness to testify that the stains found on the leggings looked like blood stains.—*White v. State*, 122.
 45. *Confession; when shown to be voluntary.*—Where a witness testifies that he did not make any promises or threats to the

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defendant to induce him to make the statement, and that while the defendant was in jail, the witness, who was county physician, while visiting a sick prisoner, talked with the defendant and asked him what made him commit the crime for which he was charged, whereupon the defendant proceeded to make a statement which implicated him as guilty of the crime charged, such statement is shown to have been voluntarily made and is admissible in evidence; the fact that the defendant was under arrest and made the statement to the witness in answer to the question that assumed his guilt, not rendering such statement inadmissible as a confession.—*Id.* 122.

46. *Homicide; admissibility of evidence.*—Where on a trial under an indictment for murder, it was shown that the deceased was killed on a road which ran by the defendant's house, and there was some evidence tending to show that the deceased had passed along said road going to a house beyond the defendant's only a short time before the killing, and there was some evidence tending to show that the defendant had a grudge against the deceased, it is competent for the State to ask a witness who was shown to have been familiar with the location and distance about the scene of the killing, that if a person left the house of the deceased and went along the road to the place of the killing, if there were any obstructions to prevent such person from being seen from the defendant's house.—*Cawley v. State*, 128.
47. *Homicide; plea of insanity; admissibility of evidence.*—On a trial under an indictment for murder, where the defendant pleads not guilty, and not guilty by reason of insanity, acts and declarations of the defendant subsequent, as well as previous to the killing, are admissible in evidence to show his true mental condition at the time of the homicide.—*Id.* 128.
48. *Homicide; admissibility of evidence.*—On a trial under an indictment for murder, where the defendant sets up the plea of self defense, declarations made by the defendant to a third party, in which he states that the deceased was mad with him and was anxious to get rid of him, the defendant, in order that he could commit an offense which the defendant interfered with, are admissible in evidence.—*Id.* 128.
49. *Same; same.*—On a trial under an indictment for murder, where the defendant sets up self defense, and there is evidence tending to establish such defense, it is competent for the defendant, upon being examined as a witness in his own behalf, to testify that the deceased was in the habit of carrying a pistol.—*Id.* 128.
50. *Evidence; admissibility of declarations and conduct of conspirators.*—When the evidence introduced in a criminal case is such as would justify the jury in reasonably inferring the existence of a conspiracy between the defendant and other persons to commit the crime with which the defendant is charged, the acts, declarations and conduct of the other conspirators, in promotion of the purpose of the conspiracy, or in furtherance of the common design to commit the crime, are competent and admissible as evidence against the defendant.—*Thomas v. State*, 139.
51. *Larceny; corpus delicti; admissibility of evidence.*—On a trial under an indictment for larceny, until the State has, by positive or circumstantial evidence, shown a *prima facie* larceny of the property described in the indictment—introduced evidence tending to establish the *corpus delicti*—which is a ques-

CRIMINAL LAW—Continued.

- tion for the determination of the court, evidence of the possession by the defendant of the goods alleged to have been stolen is inadmissible.—*Smith v. State*, 145.
52. *Same; same; same.*—On a trial under an indictment for larceny, if the evidence introduced affords inference of the larceny of the goods alleged to have been stolen, the question of its sufficiency is for the determination of the jury, and it is for the jury to determine whether the *corpus delicti* has been proven; and in such a case evidence of possession by the defendant of goods of the same kind as those charged to have been stolen is competent and admissible.—*Ib.* 145.
53. *Larceny; admissibility of evidence.*—On a trial under an indictment for larceny from a storehouse, where the evidence tends to show that a porter who was employed at the store from which the goods were alleged to have been stolen was suspected as the accomplice of the defendant in the commission of the larceny, and there was evidence showing that such porter had access to the basement of the store in which the goods alleged to have been stolen were kept, that this basement opened upon an alley-way and adjoined another store, it is competent for the State to prove that the defendant was a porter in the adjoining store and had in his possession a key to its basement, which also opened on said alley-way; the tendency of such evidence being to show the defendant's opportunity of aiding said porter in committing the larceny or for the purpose of showing that he had an opportunity of receiving the said goods from the porter. *Ib.* 145.
54. *Homicide; admissibility of evidence.*—On a trial under an indictment for murder, where it is shown that the defendant and the deceased were both white men, and the evidence on the part of the State tended to show that the deceased was killed by a gun shot which was recklessly fired by the defendant into a crowd of negroes, and one of the witnesses for the State testified on cross-examination that the killing occurred on Saturday night at a negro party, the testimony of such witness on his rebuttal examination by the State, after having been cross-examined by the defendant, "That there was a negro gathering there [the place of the killing] that night," is relevant, material and admissible. *Bailey v. State*, 155.
55. *Adultery; admissibility of evidence; competency of husband of woman as witness.*—On the trial of a man under an indictment for adultery, the husband of the woman with whom the defendant was charged with having lived in a state of adultery, and who was separately indicted for the same offense, is a competent witness to prove the unlawful cohabitation between his wife and the defendant.—*Campbell v. State*, 158.
56. *Same; admissibility of evidence.*—On a trial of a man under an indictment for adultery, where the husband of the woman with whom the defendant is charged with having lived in a state of adultery testifies to facts showing the commission by the defendant of the offense charged, and further testified to privileged communications between himself and his wife tending to show a state of enmity or alienation on the part of the wife, brought about by the defendant's presence in his house, it is competent for the husband of the woman to further testify that during such conversation between himself and his wife the defendant, who was in an adjoining room, and who overheard such conversation, laughed out loud thereat.—*Ib.* 158.

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57. *Bastardy proceedings; competent to make profert of child before the jury.*—In a bastardy proceeding, it is competent for the State to make profert of the bastard child before the jury, for the purpose of showing its resemblance to the defendant. *Kelly v. State*, 195.
58. *Same; evidence of prosecutrix's association with other men.*—On a trial in a bastardy proceeding, where the State has proven the defendant's association with the prosecutrix about the probable date of conception, it is competent for the defendant to introduce evidence showing that about the same time the prosecutrix associated with other men, particularly with a certain named man on an occasion and under circumstances affording opportunity for illicit relations.—*Ib.* 195.
59. *Selling liquor to persons of known intemperate habits; constituents of offense; burden of proof.*—To authorize a conviction under a prosecution for selling liquor to a person of known intemperate habits, it is necessary to show (1) that the defendant sold spirituous, vinous or malt liquors to the person named; (2), that such person was of intemperate habits; and, (3), that the defendant had knowledge of his intemperate habits; and the burden of establishing each and all of these facts is upon the State.—*McCormack v. State*, 202.
60. *Same; proof of known intemperate habits; admissibility of evidence.*—For the purpose of showing that the defendant had knowledge of the intemperate habits of the person to whom he is charged with having sold spirituous liquor, it is competent for the State to prove the contents of a paper in the defendant's possession which was written him by the wife of the person of known intemperate habits, in which she told the defendant of such habits, and it is not necessary as a condition precedent to the admission in evidence of such testimony, that the State should have demanded of the defendant the production of the letter.—*Ib.* 202.
61. *Same; same; same.*—For the purpose of showing that the defendant had knowledge of the known intemperate habits of the person to whom he is charged with having sold spirituous liquors, it is competent for the brother of said person to whom the liquor was alleged to have been sold to testify that he had told the defendant not to sell whiskey to his brother, and further for the State to prove by other witnesses, that said person was frequently within twelve months preceding the trial, under the influence of intoxicants; and, likewise the testimony of such person's brother that he had been a man of intemperate habits for six years, is admissible in evidence.—*Ib.* 202.
62. *Witness; competent to show interest as affecting credibility.* The interest of the witness in a cause in which he testifies may always be shown as affecting the credibility of his testimony; and in a prosecution for the sale of liquor to a person of known intemperate habits, where the employer of the defendant testifies to facts which exonerate the defendant, it is competent for the State to ask such witness if there was not then pending against him a prosecution for the same offense.—*Ib.* 202.
63. *Gaming; admissibility of evidence.*—On a trial under an indictment for gaming, where the State's witnesses testified to the defendant having played and bet at a game with dice, and that another certain named person was also in the game, it is competent for the defendant, upon cross examination of a witness, who has testified that the other per-

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son named as having played in the game was in his employ during the month the game was shown to have been played, to ask him whether said person ever got off from his work during such month; an affirmative answer to such question going to the credibility of the testimony of the State's witness as a whole.—*James v. State*, 208.

64. *Same; same*.—On a trial under an indictment for gaming, testimony that a certain named person who was said to have been in the game at the same time the defendant was playing, was not in the county when the case was tried, is irrelevant and inadmissible.—*Ib.* 208.
65. *Same; same*.—On a trial under an indictment for gaming, where on the cross examination of the State's witness there was an effort made to show that he had been officious in the prosecution of gaming cases, it is permissible for the State to prove that such witness attended the grand jury in obedience to a subpoena, and not voluntarily.—*Ib.* 208.

XI. FALSE PRETENSES.

See OBTAINING GOODS OR MONEY UNDER FALSE PRETENSES.

XII. GAMING.

66. *Gaming; house where game played within the statute*.—On a trial under an indictment charging that the defendant bet money at a game played with cards at a "storehouse for retailing spirituous liquors or house or place where spirituous liquors were at the time sold, retailed or given away," it was shown that the game was played in a room in the second story of a store; that in the room there were a bed with a mattress on it, and table and chairs; that in the first story or ground floor of said building there was a storehouse for retailing spirituous, vinous or malt liquors; that to reach the room where the game was played there was a stairway which led from the sidewalk to the second story, and there was a wooden partition which separated the stairway from the store and extended from the stairs to the ceiling; that there was no opening between the stairway and the store; and that there was no opening connecting the room where the game was played with the storeroom underneath where the liquor was sold, but it was all in the same building. *Held*: That such place of gaming came within the provisions of the statute (Code, §§ 4792-4797).—*Kicker v. State*, 193.
67. *Gaming; admissibility of evidence*.—On a trial under an indictment for gaming, where the State's witnesses testified to the defendant having played and bet at a game with dice, and that another certain named person was also in the game, it is competent for the defendant, upon cross examination of a witness, who has testified that the other person named as having played in the game was in his employ during the month the game was shown to have been played, to ask him whether said person ever got off from his work during such month; an affirmative answer to such question going to the credibility of the testimony of the State's witness as a whole. *James v. State*, 208.
68. *Same; same*.—On a trial under an indictment for gaming, testimony that a certain named person who was said to have been in the game at the same time the defendant was playing, was not in the county when the case was tried, is irrelevant and inadmissible.—*Ib.* 208.
69. *Same; same*.—On a trial under an indictment for gaming, where on cross examination of the State's witness there

CRIMINAL LAW—*Continued.*

was an effort made to show that he had been officious in the prosecution of gaming cases, it is permissible for the State to prove that such witness attended the grand jury in obedience to a subpoena and not voluntarily.—*Ib.* 208.

70. *Gaming; what is a place forbidden by the statute; charge to the jury.*—The back yard of a storehouse where spirituous, vinous or malt liquors are sold, when ingress and egress to and from such yard is through the back door of said store, comes within the prohibition of the statute against gaming, (Code, §§ 4792-4797); and a charge so instructing the jury on a trial under an indictment for gaming, is properly given. *Ib.* 208.

XIII. HOMICIDE.

71. *Homicide; conspiracy; admissibility of evidence.*—On a trial under an indictment for murder, where it is shown that the killing occurred just after a suit between the defendants' mother and the deceased had been continued, and there was evidence tending to show a conspiracy between the defendants, their father and their brother-in-law, to kill the deceased, it is competent for the State to show that just before the continuance of the case, when the defendants' mother asked for subpoenas for witnesses, the brother-in-law of the defendants stated to the justice before whom the case was pending that he need not issue the subpoenas, that "we intend to fix it up in our own way;" it being shown that just after this statement the deceased walked out of the room with the defendants and their said brother-in-law and the killing occurred a few minutes afterwards.—*Stevens v. State*, 28.
72. *Same; same; same.*—In such a case, where it is shown that on the night before the killing, the defendants staid at the house of their brother-in-law, who went with them the next day to the trial, and where the brother-in-law, on the direct examination, testified that there was no conspiracy between him and the defendants, it is competent for the State to ask him on cross examination, as to whether or not on the evening of the killing, he told a certain named person that the defendants would be at the place of trial "and hell would be raised"; and upon the witness denying having made such statement, it is competent for the State, for the purpose of impeachment, to prove by such person that the statement was made by said witness.—*Ib.* 28.
73. *Same; same; same.*—In such a case, after one of the defendants had testified that he was at the place of the difficulty as a witness in the suit pending between his mother and the deceased, and knew what the contract was between his mother and the deceased, it is competent for the State, on cross examination, to ask such defendant what was said in the contract; such question being directed to the credibility of witness' testimony.—*Ib.* 28.
74. *Homicide; charge to the jury.*—On a trial for murder, where both the evidence for the State and for the defendant prove that the homicide was committed by the defendant, a charge requested by the defendant is erroneous and properly refused which instructs the jury that "they must believe beyond a reasonable doubt and to a moral certainty that the defendant is guilty as charged in the indictment, to the exclusion of every probability of his innocence and every reasonable doubt of his guilt; and that if the prosecution has failed to furnish such measure of proof and to im-

CRIMINAL LAW—*Continued.*

- press the jury with such belief of his guilt, they should find him not guilty."—*Johnson v. State*, 38.
75. *Same; same.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if the defendant killed the deceased in the heat of passion aroused by sudden anger produced by the resistance of the boy being chastised, then the killing would not be murder unless at the time of the shooting the defendant was prompted by a willful, intentional, malicious and premeditated design to take the life of the deceased, and if every reasonable hypothesis of the innocence of the defendant is not broken down, the crime of murder is not made out."—*Ib.* 38.
76. *Same; same.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if they believe from the evidence that the killing in the case was not malicious, then the defendant would not be guilty of murder in either, and that if the killing in this case was without malice, then the defendant would not be guilty of a higher offense than manslaughter in the first degree, and that if after considering all the evidence the jury have a reasonable doubt of defendant's guilt of manslaughter arising out of any part of the evidence then they should find the defendant not guilty of any offense."—*Ib.* 38.
77. *Same; same.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if defendant was moved by sudden anger or passion provoked by his attempt to chastise his son, the deceased, and the latter's resistance, to fire the gun, but that no malice entered into it, then the defendant could not rightfully be convicted of murder."—*Ib.* 38.
78. *Court's oral charge to jury.*—On a trial under an indictment for murder, where the court in its oral charge to the jury correctly instructs the jury as to what constitutes murder in the first degree, the further instruction to the jury that "Murder in the second degree is the unlawful and malicious killing of a human being. The distinction between the two degrees of murder is the absence in murder in the second degree of that deliberation and premeditation required in murder in the first degree is free from error."—*Ib.* 38.
79. *Indictment for murder; when refusal to give charge requested need not be considered on appeal.*—Where, on a trial under an indictment for murder, the defendant was convicted of manslaughter, the refusal of the trial court to give a charge requested by him which had reference alone to murder need not be considered on appeal; the conviction of manslaughter being an acquittal of murder.—*Mitchell v. State*, 65.
80. *Homicide; charge as to inference to be drawn from flight.*—On a trial under an indictment for murder, where there is evidence tending to show that after the homicide the defendant fled to another county, a charge is erroneous and properly refused which instructs the jury that "Flight of a defendant, although a circumstance to be considered by the jury in connection with all the other evidence, is evidence of a weak and inconclusive character. It may not be evidence of guilt at all if it be shown that there was any other reason for the flight than that of a sense of guilt. Flight may proceed from an unwillingness to stand a public prosecution or from fear of the result, from an inability to explain false appearances, or from the advice of friends to avoid public excitement, and if it proceeded from any one

CRIMINAL LAW—Continued.

- or more of these reasons, then flight is not evidence of guilt at all."—*Ib.* 65.
81. *Same; charge as to interest of witness.*—On a trial under an indictment for murder, where the children of the deceased testified as witnesses, a charge is properly refused which instructs the jury that they must weigh the testimony of the children of the deceased "in the light of the fact that they are the children of the deceased, and of the material interest they have in the case."—*Ib.* 65.
82. *Same; charge as to conspiracy.*—On a trial for murder, where there is evidence tending to show a conspiracy between the defendant and his two sons who were jointly indicted with him, charges are properly refused which instruct the jury that "there is no evidence that the killing in this case was in pursuance of any conspiracy."—*Ib.* 65.
83. *Homicide; admissibility of evidence as to threats.*—On a trial under an indictment for murder, where it is shown that the killing occurred early Tuesday morning, testimony that on the Monday before the killing the defendant threatened to kill the deceased, is admissible as tending to show that the defendant bore malice towards the deceased and was actuated by malice in killing him.—*Richardson v. State*, 78.
84. *Homicide; charge as to self defense.*—On a trial under an indictment for murder, a charge seeking to instruct the jury as to self defense, but which ignores the question as to whether the defendant was impelled to shoot the deceased by the belief reasonably engendered by the circumstances that it was necessary to do so in order to save himself from the then impending danger of great bodily harm, is erroneous and properly refused.—*Ib.* 78.
85. *Same; general affirmative charge.*—On a trial under an indictment for murder, even though there is no conflict in the evidence, but there is evidence tending to show the defendant bore malice towards the deceased, and was actuated by malice in shooting him, the question as to whether or not the defendant was guilty of murder is one for the determination of the jury, and therefore charges which instruct the jury that if they "believe the evidence they can not find the defendant guilty of murder in the second degree," and that "if the jury believe the evidence in this case they will find the defendant not guilty of murder in the second degree," and that "if the jury believe the evidence in this case they will find the defendant not guilty," are erroneous and properly refused.—*Ib.* 78.
86. *Homicide; charge to the jury.*—On a trial under an indictment for murder, a charge is properly refused as being argumentative which instructs the jury "that any threats made by the deceased towards defendant, if such threats are shown to have been made by deceased, whether recently made or not, may be considered by the jury in connection with all the other evidence in the case, in determining whether or not there was real or apparent danger to defendant at the time he fired the fatal shot."—*Campbell v. State*, 81.
87. *Same; same.*—On a trial under an indictment for murder, where the evidence showed that while the deceased and the father-in-law of the defendant were engaged in an altercation the defendant approached them, and upon his speaking to the deceased there followed the difficulty which resulted in the latter's death, a charge is erroneous and properly refused which instructs the jury "that if the defendant approached the deceased in a quiet and orderly manner, that deceased replied

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- to him in an angry manner, and knocked defendant down, and that defendant reasonably and honestly believed that deceased struck him with a pistol, and reasonably and honestly believed that deceased had a pistol in his hand as defendant arose after he was knocked down and that his purpose was to do defendant serious bodily harm, and the circumstances were such as to reasonably produce such belief in defendant's mind, situated as defendant was at the time, and no reasonable and safe avenue of escape was open to defendant, then defendant had the right to anticipate his assailant and fire first, and this rule would not be changed even though it should turn out that defendant was mistaken as to his belief that deceased had a pistol in his hand."—*Ib.* 81.
88. *Homicide; verdict of jury; sufficiency thereof.*—A verdict of the jury that "We, the jury, find the defendant guilty of manslaughter...er and fix the punishment at five years in the penitentiary," is sufficient to show that the jury found the defendant guilty of manslaughter in the first degree, and is sufficient to sustain a sentence of imprisonment in the penitentiary for five years.—*Watkins v. State*, 88.
89. *Homicide; charge as to freedom from fault in bringing on difficulty.*—In a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "if they believe from all the evidence that the defendant was reasonably free from fault in bringing on the difficulty, it can not be said that he was responsible for bringing on the difficulty."—*Scott v. State*, 112.
90. *Same; same.*—In such a case, a charge is erroneous and properly refused which instructs the jury that "under the evidence in this case the accused can not be deprived of the right of self-defense under the charge of murder in the indictment, even though the proof shows that the accused was in fault in bringing on the difficulty, unless it be further shown that he intended to bring it on, and to bring it on with felonious intent."—*Ib.* 112.
91. *Same; charge as to good character.*—The good character of a defendant in a criminal case is never of itself sufficient to generate a reasonable doubt of the defendant's guilt; and, therefore, a charge is erroneous and properly refused which instructs the jury that "If they find from the evidence that the defendant is a man of good character, they may consider that character in connection with the other evidence in the case in determining his guilt, and it may generate a reasonable doubt of his guilt."—*Ib.* 112.
92. *Same; charge as to fault in bringing on difficulty.*—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "If the defendant acted in self-defense in the difficulty at the beginning, and even though he might have renewed it after the deceased retreated, yet if they believe that the defendant did not realize that the deceased had abandoned the difficulty, then they must acquit the defendant."—*Ib.* 112.
93. *Homicide; when production of bundle of clothing during trial without injury to defendant.*—Where on a trial under an indictment for murder, the court, at the request of the solicitor, had a bundle of clothing found at the house of the defendant's co-defendant produced in court, and such bundle was laid where the jury could see it, but it is not shown that the bundle was opened and its contents exposed to the jury, no injury resulted to the defendant from such action on the part of the court.—*White v. State*, 122.

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94. *Same; admissibility of evidence.*—Where on a trial under an indictment for murder, a physician testified that he had had considerable experience in examining blood spots, and had examined the defendant's leggings which were worn by him on the day of the homicide, it is competent for such witness to testify that the stains found on the leggings looked like blood stains.—*Ib.* 122.
95. *Homicide; conspiracy; charge to the jury.*—On a trial under an indictment for murder, where there was evidence tending to show that the defendant and another party acted in concert in killing the deceased, a charge which instructs the jury that "no matter how strong the circumstances may be in this case, if they can be reconciled with a theory that some other person did the killing charged against the defendant," the jury should acquit him, is erroneous and properly refused.—*Ib.* 122.
96. *Same; plea of self defense and insanity; charge to the jury.* On a trial under an indictment for murder, where the defendant pleads not guilty and not guilty by reason of insanity, and the two issues are submitted and tried at the same time, a charge is erroneous and properly refused which instructs the jury that "if the jury believe from the evidence that the defendant committed the act under circumstances which would be criminal or unlawful if he was sane, the verdict should be not guilty, if the killing was an offspring or product of mental disease in the defendant." *Cawley v. State*, 128.
97. *Same; self defense; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads self defense, a charge is erroneous and properly refused which instructs the jury that "if the defendant did not provoke or bring on the difficulty, and the deceased advanced upon him drawing his hand from his pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw and fire, the defendant was authorized to anticipate him and fire first."—*Ib.* 128.
98. *Same; plea of insanity; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads not guilty by reason of insanity, a charge is erroneous and properly refused which instructs the jury that even if they should believe from the evidence that the defendant at the time of the killing had the capacity to distinguish between right and wrong, "yet if the jury should believe from the evidence that defendant was moved to action by the insane impulse controlling his will or judgment, then he is not guilty of the offense charged."—*Ib.* 128.
99. *Homicide; self defense; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads self defense, charges requested by the defendant, which assume as matter of law that facts postulated therein created imminent peril to life or limb, invade the province of the jury, whose duty it is to determine whether the defendant was in imminent peril, and such charges are properly refused.—*Ib.* 128.
100. *Homicide; admissibility of evidence.*—On a trial under an indictment for murder, where it is shown that the defendant and the deceased were both white men, and the evidence on the part of the State tended to show that the deceased was killed by a gun shot which was recklessly fired by the defendant into a crowd of negroes, and one of the witnesses for the State testified on cross examination that the killing occurred

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- on Saturday night at a negro party, the testimony of such witness on his rebuttal examination by the State, after having been cross-examined by the defendant, "That there was a negro gathering there [the place of the killing] that night," is relevant, material and admissible.—*Bailey v. State*, 155.
101. *Homicide; charge to the jury*.—On a trial under an indictment for murder, where there was evidence tending to show that the defendant recklessly fired a gun into a crowd of negroes, which resulted in the killing of the deceased who was standing near the negroes, a charge which instructs the jury that "Unless the jury are satisfied from the evidence beyond a reasonable doubt that the defendant fired the gun with the intention to kill a human being, they can not find the defendant guilty of murder in the second degree," is erroneous and properly refused.—*Ib.* 155.
102. *Homicide; charge to the jury*.—On a trial under an indictment for murder, a charge is free from error which instructs the jury that "If the jury have a reasonable doubt as to whether the killing was done deliberately, or as to whether it was done premeditatively, then they can not find the defendant guilty of murder in the first degree, and if they have a reasonable doubt as to whether the killing was done in malice, then they can not find the defendant guilty of murder in either degree, but only manslaughter at most; and if after considering all the evidence, the jury have a reasonable doubt as to defendant's guilt of manslaughter, arising out of all the evidence, then they should find the defendant not guilty of any offense," and such charge should be given at the request of the defendant.—*Adams v. State*, 166.
103. *Same; same; burden of proof*.—On a trial under an indictment for murder, a charge is erroneous and properly refused which instructs the jury that "The burden of proof is not shifted from the State to the defendant, and the presumption of innocence abides with the defendant, until all the evidence in the cause convinces the jury to a moral certainty that the defendant can not be guiltless." (*Dowdell, J., dissenting.*)—*Ib.* 166.
104. *Homicide; charge to the jury*.—On a trial under an indictment for murder, where there is evidence tending to show that the defendant brought on the difficulty, a charge is erroneous and properly refused which instructs the jury that "If one assaulted suddenly and under the maddening influence of blows slays his assailant, and there is nothing else in the transaction, this is manslaughter and not murder."—*Ib.* 166.
105. *Same; same; self-defense*.—On a trial under an indictment for murder, charges which hypothesize self-defense in general terms, or which hypothesize one or more elements of self-defense, and which omit to set out all the constituent elements of self-defense, are erroneous and properly refused. *Ib.* 166.

XIV. IMPEACHMENT.

See WITNESSES.

XV. INDICTMENTS AND COMPLAINTS.

106. *Robbery; sufficiency of indictment*.—An indictment for robbery which describes the property alleged to have been feloniously taken as "thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of
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- five cents," is sufficiently particular in the description of said property, and is not subject to demurrer for vagueness and indefiniteness of description.—*Nevill v. State*, 99.
107. *Same; same*.—An indictment for robbery which describes the property alleged to have been feloniously taken as "a bunch of keys of the value of one dollar," and "a knife of the value of seventy-five cents," is sufficiently particular in the description of said property, and is not subject to demurrer upon the ground of vagueness and indefiniteness of description.—*Ib.* 99.
108. *Robbery; when election on the part of the State not required*. Where an indictment for robbery contains three counts, one of which charges the property feloniously taken to be "thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents," and the second count charges the property alleged to have been taken as "a bunch of keys of the value of one dollar," and the third count charges that the defendant feloniously took "a knife of the value of seventy-five cents," there is not presented a case for compelling the State to elect as between the several counts of the indictment as to which one he will ask for a conviction.—*Ib.* 99.
109. *Indictment; sufficient averments of ownership of property*.—In an indictment for larceny from a storehouse, where the storehouse and the property alleged to have been stolen therefrom belonged to a partnership, the ownership of said storehouse and the property is sufficiently laid in one of the members of the partnership.—*Smith v. State*, 145.
110. *Obtaining goods under false pretenses; sufficiency of indictment*.—An indictment for obtaining goods under false pretenses, which charges that the defendant did make false pretenses to "Herbert Evans with intent to defraud," setting out such pretenses, and that by means of such false pretenses, "obtained from the firm of Evans Brothers, a partnership composed of A. C. Evans, Chas. B. Evans and Herbert H. Evans," certain specified goods and merchandise, is not subject to demurrer upon the ground that it failed to show that Herbert Evans was either a member of the partnership, a clerk, servant, employee or agent of the firm of Evans Brothers; it not appearing from the face of the indictment that there were two persons bearing the name of Herbert Evans and the identity of the name being presumptive of the identity of the person.—*Woods v. State*, 162.
111. *Carrying concealed weapons; sufficiency of complaint*.—A complaint which charges that within twelve months before the making thereof the defendant "carried concealed about his person a pistol," is not bad or subject to demurrer for the mistake in the spelling of the words person and pistol; such mistake being a mere clerical or grammatical error.—*Hampton v. State*, 180.

XVI. JURORS AND JURIES.

112. *Organization of jury; effect of court putting back in jury box the names of jurors drawn for special venires*.—While it is improper for the court, after drawing special venires from the jury box for the trial of capital cases to replace in the jury box the names of the jurors so drawn, still if it appears subsequently in the drawing of a special venire for the trial of another capital case, that no one of the persons drawn on the previous venires were drawn to try such later case, the

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- improper action of the court in returning to the box the names of the jurors drawn on the previous venire did not deprive the defendant, who was subsequently to be tried, of any legal right, nor did he suffer any special injury by such unlawful act on the part of the court; and, therefore, a motion to quash the special venire subsequently drawn is properly overruled.—*Jimmerson v. State*, 18.
113. *Organization of jury in capital case; quashing venire.*—When a special venire is ordered in a criminal case, including the regular jurors drawn and summoned for the week of the trial, it is no objection to the special venire and constitutes no ground for quashing it, that the names of persons drawn to complete the panel of petit jurors for the week did not appear upon the special venire served upon the defendant.—*Johnson v. State*, 38.
114. *City court of Montgomery; power as to organization of juries.* Although the city court of Montgomery is an inferior court, and of statutory creation, it is, in all criminal matters, a court of general jurisdiction; and in the organization of grand and petit juries for the administration of the criminal law, it possesses like powers to those conferred by the statutes upon circuit courts.—*Lide v. State*, 43.
115. *Same; organization of special grand jury.*—Section 5000 of the Code, providing for the organization of a special grand jury during the session of the court after the grand jury has been discharged, is not repealed, so far as Montgomery county is concerned, by the act of the General Assembly creating the city court of Montgomery, and the local statutes enacted for the selection and drawing of juries for Montgomery county; and where, during the term of the city court, after the regular grand jury for such term has been discharged, an offense is committed in Montgomery county, the city court has authority and power, under said statute (Code, § 5000), to organize a special grand jury for the investigation of the offense.—*Ib.* 43.
116. *Same; same.*—In the organization of a special grand jury by the city court of Montgomery, under the provisions of the statute providing therefor (Code, § 5000), where the order commands "the sheriff forthwith to summon eighteen persons possessing the requisite qualifications of grand jurors," it is no objection to an indictment preferred by the grand jury so organized, that the sheriff did not select the names of the persons summoned by him, in obedience to the orders of the court, from the jury list which is required to be kept in the office of the judge of probate by the special jury law for Montgomery county.—*Ib.* 43.
117. *Organization of jury in capital case; when motion to quash venire should be sustained.*—When a special venire is ordered in a criminal case, including the regular jurors drawn and summoned for the week of the trial, and the list served on the defendant includes the names of some who were drawn but were not summoned as jurors for the week of the trial, the venire should be quashed upon motion made before entering upon the trial.—*Smith v. State*, 72.
118. *Organization of jury; fact that one of the jurors drawn is dead no ground for quashing venire.*—The fact that one of the persons whose name was drawn and placed upon the venire for the trial of a capital case was dead at the time the venire was drawn, constitutes no ground for quashing the venire; there being no evidence that the death was known to the court at the time of the drawing of the jury, or of any

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- fraud by which the name of such dead juror was placed upon the list.—*Watkins v. State*, 88.
119. *Organization of jury; when juror properly excused*.—When in his examination touching the qualification of one who has been summoned as a juror for the trial of a murder case, it is shown that he was on the grand jury when the indictment for an assault with intent to murder the deceased was found against the defendant for the same act with which he is now charged with murder, and that said juror was on the defendant's bail bond for his appearance in the present case, it is not error for the court, of its own motion, to excuse such juror from sitting on the jury and ordering him to stand aside.—*Scott v. State*, 112.
120. *Trial and its incidents; competency of juror*.—An assault with intent to murder is "an offense of the same character" as murder, within the meaning of the statute (Code, § 5016), defining the grounds of challenge of jurors in criminal cases; and when one who is summoned as a juror for the trial of the defendant under an indictment for murder, is shown to have an indictment for assault with intent to murder pending against him, it is proper for the court to sustain a challenge for cause of such juror.—*Charleston v. State*, 118.
121. *Homicide; sufficiency of verdict of jury*.—On a trial under an indictment for murder, a verdict of the jury that "We, the juror, find the defendant guilty of murder in the first degree and shall suffer death," though not in proper form, is sufficient to support a judgment of the court adjudging the defendant guilty of murder in the first degree, and a sentence that he be hanged.—*Durrett v. State*, 119.
122. *Same; agreement between counsel not binding upon jury*.—On a trial under an indictment for murder, where it is agreed between the solicitor for the State and the defendant that the defendant shall withdraw his plea of not guilty and enter a plea of guilty, and that the solicitor should state to the jury that the State would be satisfied with the sentence of life imprisonment, as a punishment, such agreement is not binding upon the jury and amounts to nothing more than a recommendation; and if the jury declines to carry out such agreement and by their verdict imposes the death penalty, such verdict of the jury is valid and binding.—*Ib.* 119.
123. *Organization of petit jury in capital case; excusing juror no ground for quashing venire*.—The fact that one who was summoned as a regular juror for the week in which the defendant in a capital case was tried, and whose name was on the list served upon the defendant, was excused by the court in the organization of the regular juries for the said week and was not in attendance on the day of the defendant's trial, constitutes no ground for quashing the venire.—*White v. State*, 122.
124. *Minute entry; when presence of defendant shown thereby*. The minute entry of the arraignment of a defendant under an indictment for murder, which recites that "the defendant being in open court attended by his counsel and being duly arraigned," etc., then continues showing the order of the court setting the day for trial and the drawing of the special venire, and then sets out the rulings of the court upon the motions to quash such special venire, sufficiently shows the presence of the defendant, when the several motions to quash were ruled upon by the court.—*Cawley v. State*, 128.
125. *Organization of special venire; when properly quashed*.—When in the drawing of names of persons to serve as special

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- jurors for the trial of a capital case, the names of persons who were drawn for the regular petit juries for the week in which the trial was to be had are placed upon the venire, the venire thus drawn is improper and the court should, on motion of the solicitor, quash it and proceed to draw another from the jury box.—*Ib.* 128.
126. *Same; same; error for court to put back in box names of jurors drawn for special venire.*—It is error for the court to replace in the jury box the names of jurors drawn to serve upon a special venire, and when after this is done, a special venire is drawn to try another capital case, and upon it appears the names of the jurors which were drawn upon a former special venire, the second special venire will, upon motion properly made, be quashed.—*Ib.* 128.
127. *Same; venire not quashed by reason of mistake in name of one of the jurors.*—A mistake in writing the name of one who was drawn as a special juror to try a capital case, furnishes no ground for quashing the special venire; and the court has authority under the statute (Code, § 5007), to correct this mistake by discarding the name of the person so drawn and ordering another to be forthwith summoned to supply his place.—*Ib.* 128.
128. *Same; not necessary for list served on the defendant to show which are special and regular jurors.*—The fact that the list of jurors served upon the defendant in a capital case does not designate the names of jurors specially drawn and those drawn and summoned for the week of the court in which the trial is to be had, constitutes no ground for quashing the venire; the statute (Code, §§ 5004, 5273) not requiring such designation.—*Ib.* 128.
129. *Organization of jury; challenge of juror.*—The grand jury which preferred an indictment against the defendant also preferred indictments against several other parties charged with the same offense with which the defendant was charged. The several indictments against the other parties were pending in the court and said other persons were in custody awaiting trial under said indictment. In selecting the jury for the trial of the defendant, two of the jurors, upon being examined on their *voir dire*, testified that they were second cousins to two of the other persons who were indicted for the same offense as was the defendant. *Held:* That such relationship was a ground for challenge for cause of said jurors, and the court did not err in permitting the State to challenge said jurors for cause. *Thomas v. State*, 139.
130. *Organization of jury in capital case.*—Under the provisions of the statute regulating the manner of drawing and summoning special juries in capital cases (Code, § 5004), a special venire, composed of not less than twenty-five nor more than fifty names, must be drawn for each capital case; and it is error for the court to draw one special venire for the trial of two defendants, separately indicted for separate and distinct felonies.—*Adams v. State*, 166.
131. *Same.*—Under the provisions of the statute, it is the right of a defendant indicted for a capital offense to have a jury selected from all the persons summoned as special jurors, who are in attendance and who are competent (Code, §§ 5004, 5005, 5009); and it is not only error for the court to draw one special venire for the trial of two defendants indicted for separate and distinct felonies, whose trials are set for

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the same day, but it is also error for the court, after having selected a jury from the special and regular juries, for the trial of one of the defendants, to deny the other defendant the right of passing on said jurors in the organization of the jury for the latter's trial.—*Ib.* 166.

XVII. LARCENY.

132. *Indictment; sufficient averments of ownership of property.*—In an indictment for larceny from a storehouse, where the storehouse and the property alleged to have been stolen therefrom belonged to a partnership, the ownership of said storehouse and the property is sufficiently laid in one of the members of the partnership.—*Smith v. State*, 145.
133. *Larceny; presumption arising from possession of recently stolen property.*—The unexplained possession of property recently stolen, does not, as matter of law, raise a presumption of guilt of larceny; nor does unexplained possession of goods belonging to another raise the presumption that a larceny has been committed and that the possessor is guilty thereof. *Ib.* 145.
134. *Larceny; corpus delicti; admissibility of evidence.*—On a trial under an indictment for larceny, until the State has, by positive or circumstantial evidence, shown a *prima facie* larceny of the property described in the indictment—introduced evidence tending to establish the *corpus delicti*—which is a question for the determination of the court, evidence of the possession by the defendant of the goods alleged to have been stolen is inadmissible.—*Ib.* 145.
135. *Same; same; same.*—On a trial under an indictment for larceny, if the evidence introduced affords inference of the larceny of the goods alleged to have been stolen, the question of its sufficiency is for the determination of the jury, and it is for the jury to determine whether the *corpus delicti* has been proven; and in such a case evidence of possession by the defendant of goods of the same kind as those charged to have been stolen is competent and admissible.—*Ib.* 145.

XVIII. MALICE.

See HOMICIDE.

XIX. OBTAINING GOODS OR MONEY UNDER FALSE PRETENSES.

136. *Obtaining goods under false pretenses; sufficiency of indictment.*—An indictment for obtaining goods under false pretenses, which charges that the defendant did make false pretenses to "Herbert Evans with intent to defraud," setting out such pretenses, and that by means of such false pretenses, "obtained from the firm of Evans Brothers, a partnership composed of A. C. Evans, Chas. B. Evans and Herbert H. Evans," certain specified goods and merchandise, is not subject to demurrer upon the ground that it failed to show that Herbert Evans was either a member of the partnership, a clerk, servant, employee or agent of the firm of Evans Brothers; it not appearing from the face of the indictment that there were two persons bearing the name of Herbert Evans and the identity of the name being presumptive of the identity of the person.—*Woods v. State*, 162.
137. *Same; every pretense must not be false.*—On a trial under an indictment for obtaining goods under false pretenses, it is not necessary to a conviction that every pretense charged in the indictment should be proved; but it is sufficient to authorize a conviction if a material part of the false pretenses charged be shown, and it be further shown that it was made

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with the intent to defraud and that it induced the person sought to be wronged to part with his property.—*Ib.* 162.

XX. PLEAS AND DEFENSES.

138. *Insanity; burden of proof; reasonable doubt.*—When insanity is set up as a defense in a criminal case, the burden is upon the defendant to establish the insanity to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not justify an acquittal.—*Lide v. State*, 43.
139. *Same; what necessary to justify acquittal.*—When insanity is set up as a defense in a criminal case, the defendant must show by a preponderance of the evidence (1) that at the time of the commission of the crime he was afflicted with a disease of the brain, rendering him idiotic or otherwise insane; (2) that being so afflicted he did not know right from wrong as applied to the particular action; (3) if knowing right from wrong, that he had by reason of duress of such mental disease, lost the power to chose between right and wrong, and to avoid doing the act; and (4) that the crime was so connected with such mental disease in the relation of cause and effect as to have been the product of it solely. *Ib.* 43.
140. *Trial and its incidents; motion in arrest of judgment must be shown by the record.*—A motion in arrest of judgment must be presented to the Supreme Court for revision by the record; and when such motion appears only in the bill of exceptions it will not be considered on appeal.—*Durrett v. State*, 119.
141. *Homicide; plea of insanity; admissibility of evidence.*—On a trial under an indictment for murder, where the defendant pleads not guilty, and not guilty by reason of insanity, acts and declarations of the defendant subsequent, as well as previous to the killing, are admissible in evidence to show his true mental condition at the time of the homicide. *Cawley v. State*, 128.
142. *Same; plea of self defense and insanity; charge to the jury.* On a trial under an indictment for murder, where the defendant pleads not guilty and not guilty by reason of insanity, and the two issues are submitted and tried at the same time, a charge is erroneous and properly refused right and wrong, "yet if the jury should believe from the evidence that the defendant committed the act under circumstances which would be criminal or unlawful if he was sane, the verdict should be not guilty, if the killing was an offspring or product of mental disease in the defendant." *Ib.* 128.
143. *Same; plea of insanity; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads not guilty by reason of insanity, a charge is erroneous and properly refused which instructs the jury that even if they should believe from the evidence that the defendant at the time of the killing had the capacity to distinguish between right and wrong, "yet if the jury should believe from the evidence that defendant was moved to action by the insane impulse controlling his will or judgment, then he is not guilty of the offense charged."—*Ib.* 128.
144. *Motion in arrest of judgment; how should be shown on appeal.* A motion in arrest of judgment, the ruling thereon, and the reservation of the question as to such ruling can not be pre-

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sented on appeal by bill of exceptions, but must be shown by the record proper; and when presented only by bill of exceptions, the ruling of the trial court thereon will not be reviewed.—*Hampton v. State*, 180.

145. *Same; when properly made*.—In a criminal case, a motion in arrest of judgment must be disposed of by being denied or granted after the verdict, and before the court proceeds to pronounce sentence upon the accused; and when not made until after the sentence is pronounced, such motion comes too late.—*Ib.* 180.
146. *Pleading and practice; sufficiency of replication to plea of former conviction*.—A replication to the plea of former conviction which does not either expressly or impliedly deny the facts averred in said plea nor present any issue of fact, is subject to demurrer.—*Walkley v. State*, 183.

XXI. REASONABLE DOUBT.

147. *Homicide; charge as to reasonable doubt*.—On a trial under an indictment for murder, a charge is free from error and properly given at the request of the State which instructs the jury that "a doubt, to acquit the defendant, must be actual and substantial, not mere possibility or speculation. It is not a mere possibility or possible doubt because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt."—*Jimmerson v. State*, 18.
148. *Same; same*.—In such a case a charge is erroneous and properly refused which instructs the jury that "if they believe from all the evidence in this case that there existed in the mind of the defendant at the time he fired the fatal shot, a reasonable apprehension of imminent danger to his life or limb, then the defendant could lawfully act upon appearances and kill the deceased, if the defendant was without fault in bringing on the difficulty."—*Ib.* 18.
149. *Same; same*.—In such a case a charge is erroneous and properly refused which instructs the jury that "if there be a single juror who has a reasonable doubt of the guilt of the defendant, growing up out of the evidence in this case, the jury should acquit the defendant."—*Ib.* 18.
150. *Same; same*.—In such a case a charge is erroneous and properly refused which instructs the jury that "a reasonable doubt, is a doubt growing up out of all the evidence, in the case for which you can give a reason, and, if there is a reasonable doubt of defendant's guilt, the jury should acquit the defendant."—*Ib.* 18.
151. *Same; charge as to self defense*.—On a trial under an indictment for murder, a charge which instructs the jury that "an apprehension of imminent danger caused by acts or demonstrations by the deceased or by threats or words coupled with acts or declarations, is sufficient to justify a deadly assault upon the deceased," is erroneous and properly refused.—*Ib.* 18.
152. *Same; same*.—In such a case, a charge as to self defense, which fails to hypothesize a reasonable belief by defendant that he was in imminent peril, is erroneous and properly refused.—*Ib.* 18.
153. *Charge of court as to reasonable doubt*.—In the trial of a criminal case, a charge is properly refused as being argumentative, which instructs the jury that "before you can convict the defendant you must be satisfied to a moral certainty not only that the proof is consistent with the guilt of the defendant, but it is wholly inconsistent with every

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- other rational conclusion, and unless you are so convinced by the evidence of the defendant's guilt, that you would each venture to act upon that decision in matters of the highest concern and importance to your own interest, you must find the defendant not guilty."—*Nevill v. State*, 99.
154. *Same; propriety of explanatory charge.*—Where a court upon the request of the defendant instructs the jury that "I charge you that the only foundation for a verdict of guilty is that the entire jury shall believe from the evidence beyond a reasonable doubt and to a moral certainty, that the defendant is guilty as charged in the indictment, to the exclusion of every possibility of his innocence and every reasonable doubt of his guilt; and if the State has failed to furnish such measure of proof and to so impress the minds of the jury of his guilt, they should find him not guilty," it is not error for the court by way of explanation to further instruct them orally that "that means, gentlemen, that every member of the jury must believe the defendant is guilty beyond a reasonable doubt before a conviction should be had."—*Ib.* 99.
 155. *Same; same.*—Where the court, at the request of the defendant, instructs the jury that "I charge you to acquit, unless the evidence excludes every reasonable supposition but that of defendant's guilt," it is not error for the court by way of explanation, to further instruct the jury that "that means you must believe defendant's guilt beyond a reasonable doubt, or acquit."—*Ib.* 99.
 156. *Same; charge as to reasonable doubt.*—On the trial of a criminal case, a charge given by the court at the request of the State, instructing the jury that "if any one of the jury has a reasonable doubt of the guilt of the defendant, they are not for this reason required to acquit the defendant," is free from error.—*Ib.* 99.
 157. *Charge of court to jury; reasonable doubt and probability of innocence.*—In the trial of a criminal case, a charge requested by the defendant which instructs the jury that "a reasonable doubt of defendant's guilt is not the same as a probability of his innocence. A reasonable doubt of defendant's guilt may exist when the evidence fails to convince the jury that there is a probability of defendant's innocence," asserts a correct legal proposition, is not ambiguous, argumentative or misleading, and its refusal is a reversible error. *Stewart v. State*, 105.
 158. *Charge as to reasonable doubt.*—In a criminal case, a charge which instructs the jury that in order to convict they must find that "there is no other possible or reasonable conclusion to be reached but that of defendant's guilt," is erroneous and properly refused.—*White v. State*, 122.
 159. *Charge as to reasonable doubt.*—On the trial of a criminal case, a charge which instructs the jury that if they "have a reasonable doubt as to the conclusions of the proof of any single fact, which it is necessary for the State to prove, they must acquit the defendant," is confusing and calculated to mislead the jury, and for these reasons is properly refused. *Thomas v. State*, 139.
 160. *Same; charge as to reasonable doubt.*—In a criminal case, a charge which instructs the jury that a reasonable doubt "is a doubt for which a reason can be given," is properly refused, being calculated to confuse and mislead the jury. *Cawley v. State*, 128.

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161. *Charge to the jury; reasonable doubt.*—In a criminal case, a charge which instructs the jury that "unless the evidence is such as to exclude to a moral certainty every hypothesis but that of the guilt of the defendant of the offense charged in the indictment, you should acquit him," is erroneous and properly refused, in that it omits the word "reasonable" as qualifying "hypothesis."—*Smith v. State*, 145.
162. *Reasonable doubt; charge to the jury.*—In a criminal case, a charge which instructs the jury that if they "believe the defendant is guilty from the evidence to a moral certainty," they must convict the defendant, is free from error, and is properly given at the request of the State.—*Brown v. State*, 152.
163. *Charge to the jury; reasonable doubt.*—In a criminal case, a charge which instructs the jury that "if you do not believe the evidence beyond a reasonable doubt you are not required to find the defendant guilty," is erroneous and properly refused.—*Hampton v. State*, 180.

XXII. RETAILING SPIRITUOUS LIQUORS.

See SELLING SPIRITUOUS LIQUORS CONTRARY TO LAW.

XXIII. ROBBERY.

164. *Robbery; sufficiency of indictment.*—An indictment for robbery which describes the property alleged to have been feloniously taken as "thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents," is sufficiently particular in the description of said property, and is not subject to demurrer for vagueness and indefiniteness of description.—*Nevill v. State*, 99.
165. *Same; same.*—An indictment for robbery which describes the property alleged to have been feloniously taken as "a bunch of keys of the value of one dollar," and "a knife of the value of seventy-five cents," is sufficiently particular in the description of said property, and is not subject to demurrer upon the ground of vagueness and indefiniteness of description.—*Id.* 99.
166. *Same; when election on the part of the State not required.* Where an indictment for robbery contains three counts, one of which charges the property feloniously taken to be "thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents," and the second count charges the property alleged to have been taken as "a bunch of keys of the value of one dollar," and the third count charges that the defendant feloniously took "a knife of the value of seventy-five cents," there is not presented a case for compelling the State to elect as between the several counts of the indictment as to which one he will ask for a conviction.—*Id.* 99.
167. *Robbery; admissibility of evidence.*—Where two persons are jointly indicted for robbery and a severance is had, and upon the trial of one of them the evidence for the State shows that the offense charged was committed by the defendant's co-defendant pointing a pistol at the person alleged to have been robbed, it is competent for the State to prove that the defendant's co-defendant was seen with a pistol an hour or two before the commission of the alleged robbery; such evidence tending to corroborate the testimony for the State.—*Id.* 99.

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XXIV. SELF DEFENSE.

168. *Homicide; charge as to self defense.*—On a trial under an indictment for murder, a charge which instructs the jury that "in order to invoke the doctrine of self defense defendants must have been free from fault in bringing on the difficulty—reasonably free from fault will not do," is free from error. *Stevens v. State*, 28.
169. *Homicide; self-defense.*—On the trial under an indictment for murder, charges to the jury requested by the defendant which postulate the defendant's acquittal upon the plea of self-defense, are faulty and properly refused.—*Stewart v. State*, 105.
170. *Same; burden of proof.*—Under a plea of self-defense, the burden of proof is upon the defendant, and charges which place the burden as to this issue upon the State are erroneous and properly refused.—*Ib.* 105.
171. *Same; homicide.*—On a trial under an indictment for murder, a charge which instructs the jury that "if there is generated in their minds by the evidence in this case, or any part of it, after consideration of the whole evidence by them, a well founded doubt of defendant's guilt of any offense, then the jury must find the defendant not guilty," is erroneous and properly refused.—*Ib.* 105.

See HOMICIDE.

XXV. SELLING SPIRITUOUS LIQUORS CONTRARY TO LAW.

172. *Selling spirituous liquors; charge of court on the effect of the evidence.*—On a trial under an indictment for selling spirituous, vinous or malt liquors without a license and contrary to law, where the court in its charge to the jury, after instructing them as to what constituted a sale, then charges that the State must show beyond all reasonable doubt that the defendant sold the whiskey in question to the party as alleged, or that not being the owner or interested in it or in the money paid for it, he was acting in the sale for the owner of the whiskey, it is error for the court to further instruct the jury that "there was a sale of the liquor in this case appears from the evidence almost without dispute;" this portion of the charge being upon the effect of the evidence.—*Winter v. State*, 176.
173. *Same; general charge of court to jury.*—In such a case, where in addition to the instructions contained in the general charge as above set out the court further instructed them that in order to convict the defendant they must believe from the evidence beyond all reasonable doubt that he sold the whiskey to the State's witness, or that if he did not own the whiskey he aided and assisted in the sale as the agent of the owner, it is not error for the court to further instruct the jury in its general charge that "if you believe from the evidence beyond all reasonable doubt defendant's conduct was a subterfuge to sell his own whiskey to the witness, then he would be guilty."—*Ib.* 176.
174. *Same; same.*—In such a case, it is not error for the court to instruct the jury in its general charge that "if the defendant had no interest in the whiskey, but if you believe from the evidence beyond all reasonable doubt he was acting as the agent of some one else who owned the whiskey in making a sale to the State's witness, if such sale was made, he is guilty."—*Ib.* 176.
175. *Same; charge to the jury.*—On a trial under an indictment for selling spirituous, vinous or malt liquors without a license

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- and contrary to law, a charge is erroneous and properly refused as misleading, which instructs the jury that "there is no presumption in this case that the defendant was a man who had liquor to sell;" since the defendant may have properly been found guilty as charged in the indictment, notwithstanding he had no liquor to sell.—*Ib.* 176.
176. *Soliciting sale of liquor in prohibition district; shipment not necessary to complete offense.*—Under an indictment for soliciting or receiving an order for spirituous, vinous or malt liquors in a district in which the sale of such liquors is prohibited by law (Code, § 5087), an actual shipment of the liquor ordered is not necessary to complete the offense charged; and, therefore, a charge is erroneous and properly refused which instructs the jury "that merely soliciting or receiving an order for liquor," in the prohibited district, "which is not shipped on that order, is no offense under the law."—*Levy v. State*, 190.
177. *Selling liquor to persons of known intemperate habits; constituents of offense; burden of proof.*—To authorize a conviction under a prosecution for selling liquor to a person of known intemperate habits, it is necessary to show (1) that the defendant sold spirituous, vinous or malt liquors to the person named; (2), that such person was of intemperate habits; and, (3), that the defendant had knowledge of his intemperate habits; and the burden of establishing each and all of these facts is upon the State.—*McCormack v. State*, 202.
178. *Same; proof of known intemperate habits; admissibility of evidence.*—For the purpose of showing that the defendant had knowledge of the intemperate habits of the person to whom he is charged with having sold spirituous liquors, it is competent for the State to prove the contents of a paper in the defendant's possession which was written him by the wife of the person of known intemperate habits, in which she told the defendant of such habits, and it is not necessary as a condition precedent to the admission in evidence of such testimony, that the State should have demanded of the defendant the production of the letter.—*Ib.* 202.
179. *Same; same; same.*—For the purpose of showing that the defendant had knowledge of the known intemperate habits of the person to whom he is charged with having sold spirituous liquors, it is competent for the brother of said person to whom the liquor was alleged to have been sold to testify that he had told the defendant not to sell whiskey to his brother, and further for the State to prove by other witnesses, that said person was frequently within twelve months preceding the trial, under the influence of intoxicants; and, likewise the testimony of such person's brother that he had been a man of intemperate habits for six years, is admissible in evidence.—*Ib.* 202.
180. *Selling liquor to person of known intemperate habits; charge of court.*—In a prosecution for selling spirituous liquors to a person of known intemperate habits, where the State elects to prosecute for a sale alleged to have been made on August 7, and there was evidence on the part of the defendant tending to show that on August 6 he was returning officer at the general election and did not finish the count until ten o'clock on August 7, when he went to the saloon where the sale was alleged to have been made, and remained there between fifteen and thirty minutes and then went home and slept until six o'clock in the evening, but there was positive evidence on the part of the State that the defendant sold

CRIMINAL LAW—Continued.

whiskey to a designated person on August 7th, a charge is erroneous and properly refused which instructs the jury that "if you believe from the evidence that defendant was a returning officer of the election on August 7th, and went to the Palace Saloon and between fifteen and thirty minutes went to Pattons or Lands, and then went home and slept until 6 o'clock that evening, your verdict should be for the defendant."—*Ib.* 202.

XXVI. TRIAL AND ITS INCIDENTS.

181. *Trial and its incidents; sufficiency of sentence of court on conviction for manslaughter.*—Where, on a trial under an indictment for murder, the jury returns a verdict of guilty of manslaughter in the first degree, fixing the punishment of the defendant at imprisonment in the penitentiary for two years, a sentence of the court which follows the minute entry showing the return of the verdict of the jury, and after reciting that the defendant had nothing to say why the sentence of the law should not be pronounced upon him, then reads: "It is therefore, considered by the court and it is the judgment and sentence of the court that the said defendant [naming him] be imprisoned in the penitentiary of the State of Alabama for a term of two years," is valid and sufficient to show that the judgment of the court was invoked and pronounced upon the guilt of the defendant.—*Stevens v. State*, 28.
182. *Same; sufficiency of verdict of jury.*—Where two defendants are jointly indicted and tried for murder, a verdict of the jury that "We, the jury, find the defendants guilty of manslaughter in the first degree, and fix the punishment at two years' imprisonment," if defective by reason of ambiguity, such defect is removed by the jury stating, in answer to questions asked by the court in the presence of the defendant, that the word "defendants" included both the defendants; and it is permissible for the court to remove any ambiguity by making such inquiries of the jury.—*Ib.* 28.
183. *Trial and its incidents; order of court clearing court room.* A trial court has not only the power, but it is its duty, in the trial of cases, to prevent demonstrations of approval or disapproval by spectators in the court room; and it is no ground of objection that during the trial of a criminal case, the court had the court room cleared of all spectators, because of applause in the audience occasioned by the remarks of counsel during his argument to the jury.—*Lide v. State*, 43.
184. *Trial and its incidents; right of court to direct form of verdict.* On a trial of a criminal case, where the jury returns a verdict which is irregular in form, it is not error for the court to instruct the jury as to the proper form of the verdict and direct them to retire for the purpose of making the necessary corrections.—*Ib.* 43.
185. *Robbery; when election on the part of the State not required.* Where an indictment for robbery contains three counts, one of which charges the property feloniously taken to be "thirty cents in specie coin of the United States, consisting of one piece of the denomination of twenty-five cents and one piece of the denomination of five cents," and the second count charges the property alleged to have been taken as "a bunch of keys of the value of one dollar," and the third count charges that the defendant feloniously took "a knife of the value of seventy-five cents," there is not presented a case for compelling the State to elect as between the several counts

CRIMINAL LAW—Continued.

- of the indictment as to which one he will ask for a conviction.—*Nevill v. State*, 99.
186. *Trial and its incidents; when not error for court to adjourn from court room to another room in the court house for the purpose of examining witness.*—It is not error, nor a ground of objection from any point of view, that during the trial of a criminal case the court, with the jury, the defendant, officers of the court and attorneys repaired from the court room, where the trial was being conducted, to the sheriff's office, which was in another part of the court house, for the purpose of examining a witness for the State, who was suffering from rheumatism, and who could not be brought into the court room without considerable pain to him.—*Scott v. State*, 112.
187. *Trial and its incidents; competency of juror.*—An assault with intent to murder is "an offense of the same character" as murder, within the meaning of the statute (Code, § 5016), defining the grounds of challenge of jurors in criminal cases; and when one who is summoned as a juror for the trial of the defendant under an indictment for murder, is shown to have an indictment for assault with intent to murder pending against him, it is proper for the court to sustain a challenge for cause of such juror.—*Charleston v. State*, 118.
188. *Trial and its incidents; motion in arrest of judgment must be shown by the record.*—A motion in arrest of judgment must be presented to the Supreme Court for revision by the record; and when such motion appears only in the bill of exceptions it will not be considered on appeal.—*Durrett v. State*, 119.
189. *Same; sufficiency of verdict of jury.*—On a trial under an indictment for murder, a verdict of the jury that "We, the juror, find the defendant guilty of murder in the first degree and shall suffer death," though not in proper form, is sufficient to support a judgment of the court adjudging the defendant guilty of murder in the first degree, and a sentence that he be hanged.—*Id.* 119.
190. *Same; agreement between counsel not binding upon jury.*—On a trial under an indictment for murder, where it is agreed between the solicitor for the State and the defendant that the defendant shall withdraw his plea of not guilty and enter a plea of guilty, and that the solicitor should state to the jury that the State would be satisfied with the sentence of life imprisonment, as a punishment, such agreement is not binding upon the jury and amounts to nothing more than a recommendation; and if the jury declines to carry out such agreement and by their verdict imposes the death penalty, such verdict of the jury is valid and binding.—*Id.* 119.
191. *Homicide; when production of bundle of clothing during trial without injury to defendant.*—Where on a trial under an indictment for murder, the court, at the request of the solicitor, had a bundle of clothing found at the house of the defendant's co-defendant produced in court, and such bundle was laid where the jury could see it, but it is not shown that the bundle was opened and its contents exposed to the jury, no injury resulted to the defendant from such action on the part of the court.—*White v. State*, 122.
192. *Trial and its incidents; right of court to adjourn from time to time.*—A court has the inherent power to adjourn its sitting from time to time within the time allowed by law for holding the term; and the exercise of this power operates merely

CRIMINAL LAW—Continued.

as a postponement of the business, and is not the ending of the term; and, therefore, under the statute regulating the terms of and proceedings in the county court of Elmore county, providing that the regular term "may continue until the business is disposed of," (Local Acts, 1898-99, p. 257), the adjournment of the court upon the day fixed for the holding of the regular term, to some subsequent day, prior to the time of holding the next succeeding term, does not amount to an adjournment *sine die*, but is a temporary adjournment from one day to another day of said regular term.—*Walkley v. State*, 183.

193. *Pleading and practice; sufficiency of replication to plea of former conviction*.—A replication to the plea of former conviction which does not either expressly or impliedly deny the facts averred in said plea nor present any issue of fact, is subject to demurrer.—*Ib.* 183.
194. *Trial and its incidents; reading from law books in argument to jury*.—It is not error for the court to refuse to allow defendant's counsel in his argument to the jury to read extracts from law books.—*Ib.* 183.

XXVII. VENUE.

195. *Change of venue; opinions of affiants not sufficient*.—Where, on an application for a change of venue, the affidavits filed in support thereof contain the mere expression of the opinion of the parties making them, without stating any distinct, tangible facts upon which such opinions are based, the application is properly overruled, since the mere belief of the party applying for a change of venue, or of the witnesses he introduces, that a fair and impartial trial can not be had in the county in which the indictment is found, is insufficient; facts and circumstances rendering such a trial improbable must appear.—*Lide v. State*, 43.

XXVIII. VERDICT, JUDGMENT AND SENTENCE.

196. *Trial and its incidents; sufficiency of sentence of court on conviction of manslaughter*.—Where, on a trial under an indictment for murder, the jury returns a verdict of guilty of manslaughter in the first degree, fixing the punishment of the defendant at imprisonment in the penitentiary for two years, a sentence of the court which follows the minute entry showing the return of the verdict of the jury, and after reciting that the defendant had nothing to say why the sentence of the law should not be pronounced upon him, then reads: "It is therefore, considered by the court and it is the judgment and sentence of the court that the said defendant [naming him] be imprisoned in the penitentiary of the State of Alabama for a term of two years," in valid and sufficient to show that the judgment of the court was invoked and pronounced upon the guilt of the defendant.—*Stevens v. State*, 28.
197. *Same; sufficiency of verdict of jury*.—Where two defendants are jointly indicted and tried for murder, a verdict of the jury that "We, the jury, find the defendants guilty of manslaughter in the first degree, and fix the punishment at two years' imprisonment," if defective by reason of ambiguity, such defect is removed by the jury stating, in answer to questions asked by the court in the presence of the defendant, that the word "defendants" included both the defendants; and it is permissible for the court to remove any ambiguity by making such inquiries of the jury.—*Ib.* 28.

CRIMINAL LAW—Continued.

198. *Trial and its incidents; right of court to direct form of verdict.*—On a trial of a criminal case, where the jury returns a verdict which is irregular in form, it is not error for the court to instruct the jury as to the proper form of the verdict and direct them to retire for the purpose of making the necessary corrections.—*Lide v. State*, 43.
199. *Homicide; verdict of jury; sufficiency thereof.*—A verdict of the jury that "We, the jury, find the defendant guilty of manslaughter and fix the punishment at five years in the penitentiary," is sufficient to show that the jury found the defendant guilty of manslaughter in the first degree, and is sufficient to sustain a sentence of imprisonment in the penitentiary for five years.—*Watkins v. State*, 88.
200. *Same; sufficiency of verdict of jury.*—On a trial under an indictment for murder, a verdict of the the jury that "We, the juror, find the defendant guilty of murder in the first degree and shall suffer death," though not in proper form, is sufficient to support a judgment of the court adjudging the defendant guilty of murder in the first degree, and a sentence that he be hanged.—*Durrett v. State*, 119.
201. *Minute entry; when presence of defendant shown thereby.* The minute entry of the arraignment of a defendant under an indictment for murder, which recites that "the defendant being in open court attended by his counsel and being duly arraigned," etc., then continues showing the order of the court setting the day for trial and the drawing of the special venire, and then sets out the rulings of the court upon the motions to quash such special venire, sufficiently shows the presence of the defendant, when the several motions to quash were ruled upon by the court.—*Cawley v. State*, 128.
202. *Motion in arrest of judgment; how should be shown on appeal.* A motion in arrest of judgment, the ruling thereon, and the reservation of the question as to such rulings can not be presented on appeal by bill of exceptions, but must be shown by the record proper; and when presented only by bill of exceptions, the ruling of the trial court thereon will not be reviewed.—*Hampton v. State*, 180.
203. *Same; when properly made.*—In a criminal case, a motion in arrest of judgment must be disposed of by being denied or granted after the verdict, and before the court proceeds to pronounce sentence upon the accused; and when not made until after the sentence is pronounced, such motion comes too late.—*Id.* 180.

DAMAGES.

1. *Trespass; recovery of exemplary or vindictive damages.*—In an action of trespass, exemplary or vindictive damages are recoverable if the trespass is committed with a bad motive, with an intent to harass or oppress or to injure.—*Hicks Bros. v. Swift Creek Mill Co.*, 411.
2. *Damages for personal injuries; when not shown to be excessive.* In an action against a street railway company, to recover damages for personal injuries, where it is shown that by reason of the injuries sustained the plaintiff's right arm was paralyzed and the injury resulted in his being sick and disabled for several months, and being subjected to heavy expenses for medical and hospital fees, and had suffered great mental and physical pain, and was prevented from performing the duties of his occupation for several months, a verdict assessing his damages at \$2,300 can not be said to be excessive.—*Montgomery St. R. Co. v. Mason*, 508.

DECEDENTS' ESTATES.

See ESTATES.

DEEDS.

1. *Deed; construction thereof; estates created.*—A deed whereby the owner of real and personal property conveyed it to a designated person in trust for the use of his son M. for life, and at his death "for the use and benefit of the heirs of M. at the time of his death and their heirs and assigns forever. But in case he shall leave no heir or heirs living at the time of his death, then and in that case the same real and personal estate shall go to the heirs at law of the said" grantor, "living at the time of the death of the said M. and to be distributed according to the laws of the State of Alabama for the distribution of intestate estates," and it is apparent from the instrument itself and from the situation and circumstances of the parties that it was written by a person unacquainted with the use of legal technical words, and that the word heirs used in the first limitation meant children, issue or descendants of M. living at his death, such deed vested in M. a life estate with remainder to his children living at his death.—*Findley v. Hill*, 229.
2. *Ejectment; delivery of deed; admissibility of evidence.*—In an action of ejectment, where the material question at issue is, whether there was a sufficient delivery of the deed to pass title to the property involved in the suit, and the evidence shows that after signing and acknowledging the deed the grantor therein left it with his attorney, who has been representing him in making an exchange of lands with the grantee in said deed, it is competent to introduce evidence of the transactions between the grantor and the grantee, and what was said and done at the time of the delivery of the deed by both of said parties as well as the attorney.—*Fitzpatrick v. Brigman*, 242.
3. *Ejectment; delivery of deed; charge of court to jury.*—In an action of ejectment, where the material question at issue is, whether there was a sufficient delivery of the deed to pass title to the property involved in the suit, and there was evidence introduced from which the jury might have inferred an intention on the part of the grantor to deliver the deed to the grantee named therein, the general affirmative charge requested by either party is properly refused; the intention of the grantor in the transaction being a question of fact to be determined by the jury from the circumstances attendant at the time.—*Ib.* 242.
4. *Deed; cancellation for fraud or unfair advantage.*—Where by the practice of fraud upon or the taking of undue advantage of one who is infirm with age and mentally weak, a conveyance of land is obtained for a grossly inadequate consideration, the grantor in said deed or, upon the death of the grantor, the heirs can maintain a bill in equity to rescind said contract of sale and have the deed cancelled and set aside.—*Walling v. Thomas*, 426.
5. *Same; same; waiver of right.*—The right to rescind a contract of sale and to have the deed of conveyance cancelled may be waived by the party in whom the right resides, whether he be the party originally injured, or his successor in interest; and while such waiver may be implied from conduct inconsistent with the intention to rescind, as evidenced by long acquiescence in the transaction, the mere delay in instituting proceedings to avoid the deed, is subject to explanation showing that it was not caused by acquiescence in the sale.—*Ib.* 426.

DEPOSITIONS.

1. *Deposition under the statute; should be suppressed when taken before only one of two named commissioners.*—Where, in a civil case, interrogatories are filed under the statute (Code, § 1835), and the commission issued by the clerk names two persons as commissioners, and the certificate attached to the deposition taken under said commission is signed by only one of the commissioners, and recites that he alone took the deposition of the witness to whom the interrogatories were propounded, and the adverse party is shown not to have waived the absence of the other commissioner, the taking of the deposition by only one of the commissioners was invalid, and upon a motion properly made, the deposition so taken will be suppressed; and this is true although it was not shown why the absent commissioner did not act, and there was no evidence that he did not have notice as required by the statute, but it was shown that the commissioner who acted was suggested by the party propounding the interrogatories and the name of the other commissioner was inserted in the commission upon the suggestion of the adverse party. (DOWDELL, J., *dissenting.*) *Montgomery St. R. Co. v. Mason*, 508.

DESCENT AND DISTRIBUTION.

1. *Descent and distribution; when widow is entitled to all the personal property of deceased husband.*—Under the statute, where a person dies intestate and leaves a widow but no children, the widow is entitled to all the personal estate, (Code, § 1462); and the fact that at the time of the death of the husband he and his wife were separated, does not affect the descent and distribution as prescribed by the statute, provided the marriage relation in law continued.—*Nolen v. Doss*, 269.

DETINUE.

1. *Detinue; sufficiency of plea.*—In an action of detinue, a plea that "defendant further suggests that the title to suit is partly based upon a mortgage," presents no material issue, and should, upon motion, be stricken from the file.—*Elston v. Roop & Sewell*, 331.
2. *Same; same.*—In such action, a plea which attempts only to set up fraud in the execution of the mortgage covering the property sued for by the defendants to the plaintiffs, without showing that plaintiff's title to or right to recover the property depended upon or was affected by the alleged fraud, presents no defense to the action and is subject to demurrer and motion to strike.—*Ib.* 331.
3. *Detinue; mortgage of personal property; sufficiency of judgment.* Where in an action of detinue, the plaintiff's right to possession is claimed under a mortgage which was given to secure the performance of a contract, which the mortgagor defendant had failed to perform, if there is a suggestion made upon the record that the suit was by a mortgagee against a mortgagor, as provided by statute, (Code, § 1477), and the cause is tried by the court without the intervention of a jury, it is proper for the court in rendering judgment to ascertain the amount of the mortgage debt to the amount expressly stipulated for in the mortgage, as liquidated damages which were to accrue upon the failure of the defendant to perform said contract.—*Ib.* 331.
4. *Mortgage of personal property; right of possession thereunder; detinue; admissibility in evidence.*—A mortgage of personal property, in the absence of a stipulation to the contrary,

DETINUE—*Continued.*

vests in the mortgagee a right to immediate possession; and when such mortgage is given to secure the performance of a contract, if the mortgagor fails to perform the contract, the mortgagee can maintain an action of detinue for the mortgaged property, and said mortgage is not rendered inadmissible in evidence by the non-production of the contract, the performance of which was intended to be secured by the execution of the mortgage.—*Ib.* 331.

5. *Action of detinue; when sufficient transfer of mortgage.*—In an action of detinue, where the plaintiff claims the property sued for under a mortgage alleged to have been transferred to him by a corporation, which mortgage was shown to have been lost, and the president of the corporation testified that he delivered and transferred to the plaintiff said mortgage, but did not write out any transfer thereof on the back of the mortgage until after the suit was brought, such evidence is sufficient to carry to the jury the question whether or not the plaintiff was the legal owner of the mortgage.—*Clem v. Wise*, 403.

DIVORCE.

1. *Bill for a divorce; equity pleading; orders of chancellor for taking further testimony after submission of cause.*—On a bill filed by a husband against his wife for a divorce upon the ground of voluntary abandonment, a decree *pro confesso* was rendered. The cause was then submitted by complainant for decree in vacation upon testimony taken by him. After the submission, the chancellor, for the purpose of informing himself as to whether there existed a defense to the bill, prepared interrogatories to be propounded to the defendant, which he directed the register to have answered. The register obeyed these instructions, but the complainant had no knowledge or notice of the time and place of taking the answers, nor was he given an opportunity to file cross interrogatories, to cross examine the defendant as a witness. *Held*: That in such a proceeding the complainant was denied a right to which he was entitled, and that the answers of the respondent to the interrogatories so propounded should not have been considered by the chancellor as evidence, and that, therefore, a decree, based upon such answer denying to complainant the divorce as prayed for, was erroneous.—*Wilkinson v. Wilkinson*, 381.

DURESS.

1. *Duress of goods; when party entitled to cancellation of contract.* When the possession of one's goods is unlawfully held against him, and he has such an important, urgent and immediate occasion for their possession and use as can not be subserved by a resort to the courts to recover them, he may avoid any contract he enters into with the wrongdoer, in order to regain possession of his goods; the duress of the goods under such circumstances rendering the contract invalid.—*Glass & Co. v. Haygood*, 489.
2. *Duress as ground for equitable relief.*—Duress employed to procure a conveyance of property, although a species of fraud, is not of itself a ground for equitable interference.—*Treadwell v. Torbert*, 504.

EASEMENTS.

1. *License to enter land; when in parol revocable; estoppel.*—A parol license to do an act upon the land of another is revocable.—*Vol.* 132.

EASEMENTS—Continued.

- able at the option of the licensor, although the licensee has performed acts thereunder, or has expended money in reliance thereon; and the fact that the license is executed or that money has been expended by the licensee does not equitably estop the licensor from revoking the license.—*Hicks Bros. v. Swift Creek Mill Co.*, 411.
2. *Same; revoked by sale.*—A license to do or perform an act upon the lands of another being a personal privilege, is revoked by the death of the licensor or by his conveyance or the lands to another, or whatever would deprive him of doing the acts in question or giving permission to others to do them. *Ib.* 411.
 3. *Same; can not ripen into an easement.*—Since an easement is an interest in or over the soil of another, a mere parol license to do an act upon the land of the licensor can not ripen into an easement, conferring any permanent interest in said land, which is not revocable by sale thereof.—*Ib.* 411.
 4. *Easement of view a valuable right and can be preserved.*—An easement of view or prospect from every part of a public street is, like light and air, a valuable right of which the owner of a building abutting on a street can not be deprived by an encroachment upon the street by a coterminous or adjacent proprietor; and to enjoin the erection and maintenance of a building which would obstruct the enjoyment of such right, the owner of a building can maintain a bill in equity.—*First Nat. Bank v. Tyson*, 459.
 5. *Same; municipal authorities can not grant the right to maintain public nuisance.*—The authorities of a municipality have no power to authorize the encroachment upon a sidewalk by the erection and maintenance thereon of a part of a building; and it is not a condition precedent to the maintenance of a bill to enjoin the erection and maintenance of such obstruction, that the complainant, who owned the adjacent or co-terminous building has applied without success, to the authorities of the city for relief.—*Ib.* 459.

EJECTMENT.

1. *Ejectment; delivery of deed; admissibility of evidence.*—In an action of ejectment, where the material question at issue is, whether there was a sufficient delivery of the deed to pass title to the property involved in the suit, and the evidence shows that after signing and acknowledging the deed the grantor therein left it with his attorney, who had been representing him in making an exchange of lands with the grantee in said deed, it is competent to introduce evidence of the transactions between the grantor and grantee, and what was said and done at the time of the delivery of the deed by both of said parties as well as the attorney.—*Fitzpatrick v. Brigman*, 242.
2. *Ejectment; delivery of deed; charge of court to jury.*—In an action of ejectment, where the material question at issue is, whether there was a sufficient delivery of the deed to pass title to the property involved in the suit, and there was evidence introduced from which the jury might have inferred an intention on the part of the grantor to deliver the deed to the grantee named therein, the general affirmative charge requested by either party is properly refused; the intention of the grantor in the transaction being a question of fact to be determined by the jury from the circumstances attendant at the time.—*Ib.* 242.
3. *Same; same; same.*—In such a case, a charge is properly refused as being misleading, which would authorize the jury

EJECTMENT—*Continued.*

to conclude that the delivery of the deed to the grantee in person was necessary, in order to constitute a delivery thereof. *Ib.* 242.

4. *Judgment; same; action of ejectment.*—In an action of ejectment, the cause was tried by the court without the intervention of a jury. The only witnesses testifying in the case were introduced by the plaintiff. The material contention was as to the contents of a lost deed; the plaintiff's contention being that this deed conveyed a life estate to their mother, with remainder in fee to them, while the defendant's contention was that said deed conveyed an absolute fee simple title in the mother. The testimony of four of the witnesses introduced by the plaintiff tended to show that the life estate to the mother with remainder to her children was conveyed by said deed, but the statements of these witnesses were more of their construction of the deed than statements as to their recollection of its contents, or the contents in substance, and two of the witnesses had never read the deed, but had heard it read about forty years before the trial. The other three of the witnesses introduced by the plaintiff had each read the deed, and each stated positively that it contained no conveyances of a life estate to the mother with remainder to her children, but was an absolute warranty deed to the mother, saying nothing about a life estate. *Held:* That with such conflict in the testimony of the witnesses introduced by the plaintiff, the judgment of the court in favor of the defendant cannot be said to be plainly erroneous, and, therefore, such judgment will not be reversed.—*Laster v. Blackwell*, 337.
5. *Same; same.*—To reverse a judgment on appeal, there must be manifest error appearing in the record; and in an action of ejectment, where the plaintiffs claim title as remaindermen under a lost deed, but there is no evidence in the record that the life tenant was dead at the commencement of the suit, a judgment in favor of the defendant can not be said to be erroneous, and will not be reversed.—*Ib.* 337.
6. *Ejectment; when adverse possession shown.*—In an action of ejectment, where the plaintiffs claim title as heirs at law of their deceased father, and the defendant who was also a son of the deceased claimed title by adverse possession, and it is shown without conflict that during the period of defendant's occupation of the land down to the death of the father, the father lived on the land with the defendant and his family, that the defendant gave in the lands for taxes in the name of his father, and by other unequivocal acts recognized the latter's title to the land, and the evidence further shows that the defendant entered into possession by permission of the father and not in hostility to him, the law in such case refers the possession to the title, and the defendant is shown not to have been in adverse possession; and under such evidence the plaintiffs will be entitled to recover.—*Butler v. Butler*, 373.
7. *Same; adverse possession; when declarations by defendant not admissible in evidence.*—In an action of ejectment, where the plaintiffs claim title as heirs at law of their deceased father, and the defendant who was also a son of the deceased claims title by adverse possession, and it is shown that during the period of the defendant's occupation of the land down to the death of the father, the latter also lived on the land with the defendant and his family, and by unequivocal acts throughout that period recognized the title of his father to the lands, and that his possession was acquired by permission of the father, declarations of the defendant to a third person that

EJECTMENT—Continued.

he claimed the land as his own, are of no consequence, and are immaterial and inadmissible in evidence.—*Ib.* 373.

8. *Same; same; inadmissible evidence.*—In such a case, the declarations of the father and the fact that he had given the land to the defendant and that he had put the defendant in possession are inadmissible in evidence.—*Ib.* 373.
9. *Ejectment by tenants in common; proper judgment thereon.*—In an action of ejectment, where the plaintiffs and defendants are tenants in common, and the plaintiffs claim an undivided interest in said lands, upon a verdict returned in favor of the plaintiffs, a judgment in their favor declaring that they recover of the defendant the undivided interest sued for in the complaint is proper, and in such case it is not material whether all of the tenants in common are joined in the action. *Ib.* 373.
10. *Ejectment against receiver; can not be maintained without consent of court making appointment.*—Where a receiver, in obedience to an order of the court appointing him, goes into possession of land and holds it subject to the control of the court, a third party claiming to be the owner of said land and who was ousted by the receiver, can not maintain an action of ejectment against such receiver to recover possession of the land, without the consent or order of the court by which the appointment was made.—*Baker v. Curraway*, 502.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT.

ERROR.

See APPEAL AND ERROR.

ESTATES.

1. *Deed; construction thereof; estates created.*—A deed whereby the owner of real and personal property conveyed it to a designated person in trust for the use of his son M. for life, and at his death "for the use and benefit of the heirs of M. at the time of his death, and their heirs and assigns forever. But in case he shall leave no heir or heirs living at the time of his death, then and in that case the same real and personal estate shall go to the heirs at law or said" grantor, "living at the time of the death of the said M. and to be distributed according to the laws of the State of Alabama for the distribution of intestate estates," and it is apparent from the instrument itself and from the situation and circumstances of the parties that it was written by a person unacquainted with the use of legal technical words, and that the word heirs used in the first limitation meant children, issue or descendants of M. living at his death, such deed vested in M. a life estate with remainder to his children living at his death.—*Findley v. Hill*, 229.
2. *Claim against insolvent estate; objection must be filed within the time fixed by statute.*—Objections to the allowance of a claim against an insolvent estate, upon which issue is to be made up between the claimant and the party interposing the objection under the statute, (Code, § 313), must question the merits or validity of the particular claim for matters separate from its status in respect of its filing; and if such objections are not filed within the time prescribed therefor by the statute, after the declaration of insolvency, all defenses existing or occurring within that period are barred.—*Christopher v. Stewart*, 348.

ESTATES—*Continued.*

3. *Same; statute of limitations.*—The statute of limitations does not run against a claim which has been filed against an insolvent estate; hence where an objection to such claim is based on the statute of limitations and is filed after the time prescribed by the statute for filing objections, the bar created by the latter statute is not avoided by a statement annexed to such objection that the objection arose after the claim was filed. *Ib.* 348.
4. *Same; same; what decree will support an appeal.*—Where objections to a claim against an insolvent estate are filed after the time prescribed therefor by statute and are apparently invalid, an order of the probate court, made in advance of the settlement, striking them from the file, will not support an appeal; the order in such case not being within the purview of subdivision 6, section 458 of the Code, or of other statutes, providing for appeals.—*Ib.* 348.
5. *License to enter land; when in parol revocable; estoppel.*—A parol license to do an act upon the land of another is revocable at the option of the licensor, although the licensee has performed acts thereunder, or has expended money in reliance thereon; and the fact that the license is executed or that money has been expended by the licensee does not equitably estop the licensor from revoking the license.—*Hicks Bros. v. Swift Creek Mill Co.*, 411.
6. *Same; revoked by sale.*—A license to do or perform an act upon the lands of another being a personal privilege, is revoked by the death of the licensor or by his conveyance of the lands to another, or whatever would deprive him of doing the acts in question or giving permission to others to do them. *Ib.* 411.
7. *Same; can not ripen into an easement.*—Since an easement is an interest in or over the soil of another, a mere parol license to do an act upon the land of the licensor can not ripen into an easement, conferring any permanent interest in said land, which is not revocable by sale thereof.—*Ib.* 411.
8. *Estates; when vested remainder created by will.*—Where a testator under his will devises land to his wife for life, which is "after her death to be equally divided between my [his] children which may then be surviving," the wife takes a life estate in the land and each of the children of the testator takes a vested remainder subject to be divested only by the survivorship of one or more of such children after the falling in of the life estate.—*Acree v. Dabney*, 437.
9. *Same; same; when purchaser from remainderman acquires title; ejectment.*—Where a testator devises his land to his wife for life which is, "after her death to be equally divided between my [his] children which may then be surviving," and the life tenant and each of the children of the testator executes a warranty deed to such land, the grantee in such deed acquires a fee simple title to said land; and the death of each of the children of the testator before the death of the life tenant does not give the heirs of the remaindermen the right to maintain an action of ejectment against the grantee in said deed.—*Ib.* 437.

ESTOPPEL.

1. *License to enter land; when in parol revocable; estoppel.*—A parol license to do an act upon the land of another is revocable at the option of the licensor, although the licensee has performed acts thereunder, or has expended money in reliance thereon; and the fact that the license is executed or

ESTOPPEL—Continued.

that money has been expended by the licensee does not equitably estop the licensor from revoking the license. *Hicks Bros. v. Swift Creek Mill Co.*, 411.

Bill filed to abate mill dam as a nuisance; estoppel.—Where a bill is filed seeking to have abated as a nuisance a mill dam, the facts that the complainant at the time of the erection of said dam consulted with the defendant and advised him as to the manner of its erection and was aware that the defendant was expending money in the construction of said dam, and the mill which was to be operated by the pond caused from the dam, do not work an estoppel upon the complainant to maintain such bill, upon the ground that the maintenance of such dam produced ill health in the family of the complainant and of other people in the vicinity; and such facts constitute no defense to such bill.—*Richards v. Daugherty*, 569.

EVIDENCE.**I. ADMISSIBILITY AND RELEVANCY.**

1. *Action to recover for personal injuries; admissibility of evidence.* In an action to recover damages for personal injuries, where there was evidence tending to show that the plaintiff continued to suffer more or less from the injury ever since it was received, it is competent to ask a witness who was shown to have been with the plaintiff, as to whether or not he had heard the plaintiff give expressions of pain or suffering since he received the injuries complained of.—*Postal Tel. C. Co. v. Jones*, 217.
2. *Action on an attachment bond; admissibility of evidence.*—In an action upon an attachment bond, where it is shown that the writ of attachment was not in the file and was lost, it is competent for the plaintiff to introduce in evidence the motions made by the defendants in the attachment suit to substitute the writ of attachment and for a writ of *venditioni exponas* directing the sheriff to sell the property levied upon as shown by his return on the attachment writ.—*Hamilton v. Maxwell*, 233.
3. *Ejectment; delivery of deed; admissibility of evidence.*—In an action of ejectment, where the material question at issue is, whether there was a sufficient delivery of the deed to pass title to the property involved in the suit, and the evidence shows that after signing and acknowledging the deed the grantor therein left it with his attorney, who had been representing him in making an exchange of lands with the grantee in said deed, it is competent to introduce evidence of the transaction between the grantor and the grantee, and what was said and done at the time of the delivery of the deed by both of said parties as well as the attorney.—*Fitzpatrick v. Brigman*, 242.
4. *Descent and distribution; admissibility of evidence.*—Where on the final settlement of the administration of a decedent's estate, the material question is as to whether or not his widow is entitled to take the personal property of the estate, there being no children, testimony tending to show that the wife of the decedent, at the time of his death, lived apart from him and cohabited with another man, holding herself out as his wife, is incompetent, immaterial and properly excluded.—*Nolen v. Doss*, 259.
5. *Action against a railroad company; admissibility of evidence.* In an action against a railroad company by an employee to recover for personal injuries, where the complaint alleges that by reason of certain stated negligence on the part of the engi-

EVIDENCE—Continued.

- neer the coupling pin "was thrown with great force against the plaintiff's face, striking him near his eye, whereby serious injury was inflicted on the plaintiff, his right eye being permanently impaired," and "from which plaintiff has suffered great mental and physical pain and anguish," it is competent for the plaintiff to introduce testimony showing that from the stroke of the pin he had suffered pain, in having headaches, and in having pains darting through his head in the region of the eye.—*Bir. So. R. R. Co. v. Cuzzart*, 262.
6. *Same; same*.—In such a case, where the plaintiff had testified that since the injury described in the complaint, his eyes or one of them, had in consequence of such injury been inflamed and weak, it is not competent for the defendant, on cross examination of the plaintiff, to prove the condition of the eyes of the plaintiff's father and mother, or of his brothers and sisters.—*Ib.* 262.
 7. *Action for false imprisonment; evidence of plaintiff's character not admissible*.—In an action to recover damages for false imprisonment, where the plaintiff's character has not been assailed, proof of his good character is wholly irrelevant to any of the issues involved, and such evidence should be excluded.—*Davis v. Sanders*, 275.
 8. *Action for malicious prosecution; admissibility of evidence*.—In an action against the Southern Express Company to recover damages for malicious prosecution, where the principal issue in the case was as to whether the defendant had instigated or encouraged the prosecution of the plaintiff for robbing an express car, inquiries and statements addressed by the detective or special agent of the defendant to a witness, after the plaintiff had been arrested and before his discharge, concerning plaintiff's movements and expenditure of money recently after the robbery, are competent and admissible in evidence as indicating that the defendant employed efforts to obtain evidence for use in said prosecution.—*So. Express Co. v. Couch*, 285.
 9. *Same; same*.—In such a case, it is competent for the plaintiff on cross examination of the person who swore out the warrant for his arrest, to show that the special agent or detective in the employment of the defendant expressed the opinion to such person that he had sufficient evidence to convict the plaintiff of the robbery charged.—*Ib.* 285.
 10. *Same; same*.—In such a case, it is competent for the defendant to show that the person, upon whose affidavit the warrant of arrest of the defendant was sued out, before making said affidavit and suing out such warrant, submitted fully and fairly all the facts in regard to plaintiff's guilt to a reputable practicing attorney, and was by him advised that the evidence was sufficient to justify plaintiff's conviction; such evidence having a tendency to show that the prosecution of the plaintiff was by such person independent of defendant's influence.—*Ib.* 285.
 11. *Action against endorsers of note; admissibility of evidence*.—In an action against two endorsers of a note, where the allegations of the complaint are sufficient to show that each of the defendants separately endorsed said note, any evidence on the part of either of them that he made the several and individual promises to pay the debt is good as against him, and evidence tending to show that each defendant recognized the debt as his individual obligation and made such promises is admissible in evidence.—*Brown v. Fowler*, 310.
 12. *Same; same*.—In an action by the payee against an endorser of a note, where it is alleged in the complaint that the defend-

EVIDENCE—*Continued.*

ants had promised to pay said indebtedness, and by reason of such promise the plaintiff was induced to delay the institution of the suit against the maker until after the first term to which it could have been brought, evidence of the solvency of the maker of the note at the time it fell due, and the amount of property owned by the maker and its value, is entirely irrelevant to any issue in the case and is inadmissible.—*Ib.* 310.

13. *Same; same.*—In an action by the payee of a note against the endorsers thereon, where it is alleged in the complaint that the defendants had promised to pay said indebtedness, and by reason of such promise the plaintiff was induced to delay the institution of the suit against the maker until after the first term of the court to which it could have been brought, and such promise is denied by the plaintiffs, and it is shown that the maker of the note was a corporation, it is competent for the plaintiff to show that the defendants, who were the endorsers of said note, owned a majority of the capital stock of the corporation which was the maker of said note, at the maturity of said note.—*Ib.* 310.
14. *Same; same.*—In such a case the testimony of a witness that the defendants had stated to him that they had promised the plaintiff to pay said note, is admissible in evidence.—*Ib.* 310.
15. *Same; same.*—In such a case, a letter written by one of the defendants to the brother of the plaintiff, which shows an individual promise by said defendant to pay said note, is admissible in evidence.—*Ib.* 310.
16. *Mortgage of personal property; right of possession thereunder; detinue; admissibility in evidence.*—A mortgage of personal property, in the absence of a stipulation to the contrary, vests in the mortgagee a right to immediate possession; and when such mortgage is given to secure the performance of a contract, if the mortgagor fails to perform the contract, the mortgagee can maintain an action of detinue for the mortgaged property, and said mortgage is not rendered inadmissible in evidence by the non-production of the contract, the performance of which was intended to be secured by the execution of the mortgage.—*Elston v. Roop & Sewell*, 331.
17. *Probate of will; admissibility in evidence of circumstances attending execution of the will.*—In the contest of the probate of a will, where each of the attesting witnesses are dead, and the principal issue is as to whether or not the will was duly executed, and the genuineness of the signatures of each of the attesting witnesses has been shown, it is competent for a witness who was staying with the testatrix and who had seen the will and recognized the signature of the testatrix immediately after its execution, to testify to the circumstances attendant upon the execution of said will, such as the reasons why the will was made, the going to the room of the testatrix of the lawyer and attesting witnesses for the purpose of its execution; and this is true, although such witness was not in the room at the time of the writing of the will, or when it was signed by any one, and, therefore, did not see its execution.—*Woodroof v. Hundley*, 395.
18. *Same; when evidence relating to revocation inadmissible.*—On the contest of the probate of a will, where one of the grounds of contest was that the will had been revoked and the proponent had shown *prima facie* its due execution, declarations of the testatrix that the instrument offered for probate was not her will, and the fact that after its execution she had

EVIDENCE—Continued.

sold or offered to sell certain property disposed of by said will, or that there had been a change in the testatrix' church relations, or that the estrangement between the testatrix and the contestant's father had been adjusted before her death, are immaterial and constitute no evidence of a revocation and, therefore, incompetent as evidence.—*Id.* 395.

19. *Evidence; admissibility of mortgage in action of assumpsit.*—In an action of assumpsit, wherein the plaintiff claims the value of a certain number of pounds of lint cotton, which it is averred in the complaint defendant owed plaintiff under a written instrument or mortgage made by the defendant, the mortgage referred to in the complaint is admissible in evidence; and it is no valid objection to the introduction of such mortgage in evidence that the plaintiff had not shown that it was given for a *bona fide* subsisting debt.—*Ingram v. Bussey*, 539.
20. *Action upon insurance policy; admissibility of evidence.*—When an insured, who has contracted for insurance, informs the agent of the insurance company who is authorized to issue the policy, of his desire to take out a policy of fire insurance upon a house and points out to such agent which house it is, and the agent, in describing the house insured in the policy, makes it uncertain which house is included therein, in an action upon said policy, it is competent for the insured to testify as to whether or not he pointed out to the agent the house that was burned as the one which was to be insured and told him that that was the house upon which he wished the insurance.—*Ala. Mut. F. Ins. Co. v. Minchener*, 632.

II. BURDEN OF PROOF.

21. *Bill in equity to remove cloud from title; burden of proof.* Where a bill is filed by a married woman to remove a cloud from her title, and the title of the complainant is claimed by mesne conveyances from her husband, and the defendant in his answer sets up that the conveyances by which the complainant claims title were made to hinder, delay and defraud the defendant and other creditors of the husband, the burden is upon the complainant to establish her title and possession as alleged in the bill, and to show a consideration paid for the property, and in failing to meet this burden the complainant is not entitled to the relief prayed.—*Collier v. Carlisle*, 478.
22. *Action against railroad company as bailee; burden of proof.*—In an action against a railroad company to recover for the loss of goods, under a count which seeks to recover against the defendant as a voluntary bailee, the burden is upon the plaintiff to show negligence on the part of the defendant; and in the absence of proof showing negligence, the plaintiff is not entitled to recover.—*Frederick v. L. & N. R. R. Co.*, 486.
23. *Fraudulent conveyance; burden of proof.*—In an action by an existing creditor to set aside a conveyance as fraudulent, the burden of proof is on the complaining creditor to show the existence of his debt; but the existence of the debt being shown and the conveyances being admitted, the burden of proof is on the grantee in the conveyance to show the *bona fides* of the transaction.—*Russell v. Davis*, 647.
24. *Bill to annul proceedings in attachment suit; burden of proof; sufficiency of evidence.*—Where a bill is filed by creditors to have annulled proceedings in an attachment suit, whereby the goods of complainant's debtor were seized and sold, upon the ground that the attachments were sued out by the attaching

EVIDENCE—Continued.

creditors in collusion with the debtor, without the existence of statutory ground therefor, and for the purpose of hindering, delaying and defrauding the complainants and other creditors, the burden of proving the charges made is upon the complainant; and where the evidence introduced shows without conflict that the defendant in attachment was indebted to the plaintiffs in said suit and the evidence further tended strongly to show that there was at least probable cause for the issuance of the attachment, the averments of fraud contained in such bill are not sustained, and upon such evidence the complainants are not entitled to relief.—*Adair & Co. v. Feder*, 620.

III. OBJECTIONS.

25. *Evidence; general objections properly overruled.*—Where a portion of the testimony to which a general objection is interposed is competent and admissible in evidence, such general objection is properly overruled.—*Hamilton v. Maxwell*, 233.
26. *Evidence; when motion to exclude properly overruled.*—A motion to exclude the entire evidence of a witness, some of which is admissible and unobjectionable, is properly overruled.—*Brown v. Fowler*, 310.

IV. PAROL AND WRITTEN.

27. *Adverse possession; when declarations by defendant not admissible in evidence.*—In an action of ejectment, where the plaintiffs claim title as heirs at law of their deceased father, and the defendant who was also a son of the deceased claims title by adverse possession, and it is shown that during the period of the defendant's occupation of the land down to the death of the father, the latter also lived on the land with the defendant and his family, and by unequivocal acts throughout that period recognized the title of his father to the lands, and that his possession was acquired by permission of the father, declarations of the defendant to a third person that he claimed the land as his own, are of no consequence, and are immaterial and inadmissible in evidence.—*Butler v. Butler*, 373.
28. *Same; same; inadmissible evidence.*—In such a case the declarations of the father and the fact that he had given the land to the defendant and that he had put the defendant in possession are inadmissible in evidence.—*Id.* 373.
29. *Evidence; admissibility of paper signed by directors of corporation.*—A writing signed by directors of a corporation, reciting the meeting of the board and stating that by unanimous consent of the board of directors, the corporate assets were sold to a designated person and authorizing the president of the corporation to transfer all of the corporation's interest in its assets to said person, is admissible as evidence of a sale and the authority of the president to make the transfer in behalf of the corporation, in connection with a by-law of the corporation providing that the corporate powers of the company were vested in the board of directors, and the oral testimony of the president that said sale and transfer were made.—*Clem v. Wise*, 403.

V. PRIMARY AND SECONDARY.

30. *Evidence; secondary evidence.*—In an action upon an attachment bond, where evidence is introduced that the writ of *venditioni exponas*, issued under an order of the court directing the sale of the property levied upon under a writ of attachment,

EVIDENCE—Continued.

was not in the file of papers in the case, and could not be found after diligent search by the clerk and sheriff in the places where such papers were usually kept, and could not be found in the office of either of such officers, secondary evidence of the contents of such *venditioni exponas* and of its execution, is admissible in evidence.—*Hamilton v. Maxwell*, 233.

VI. WEIGHT AND SUFFICIENCY.

31. *Action upon a contract; when plaintiff not entitled to recover.* Where a contract is made, stipulating that a certain reward would be paid to the party named in said contract if he disclosed the whereabouts of a certain designated outlaw, so as to enable the party offering the reward to effect the outlaw's capture, before the party named in the contract, or his assignee, can claim the reward or maintain an action to recover it under the contract, it must be shown that he furnished the information of facts actually in existence, which information in itself was sufficient to lead to, or to enable the promisor to, effect the capture; and the mere furnishing of information, vague and uncertain in character and derived from knowledge of past acts, habits and associations of the outlaw, and which do not directly lead to the capture, does not entitle the party to recover the reward stipulated for in the contract. *Cash v. So. Express Co.*, 272.

EXECUTION OF WRITTEN INSTRUMENTS.

1. *Execution of written instrument; attestation by one who did not see party sign.*—A writing may be validly attested by one who did not see the parties executing it sign such writing, if such parties appear before him and acknowledge that the signatures to the writing are their own, and requested him to sign in attestation of that fact; and this is true although the signatures of one of the parties to the instrument was made by his name being written for him and he affixing his mark thereto.—*Elston v. Roop & Sewell*, 331.

EXECUTIONS.

1. *Execution; not void because costs in justice of the peace court were not itemized.*—An execution issued upon a judgment rendered by the circuit court in a cause brought there by appeal from a justice of the peace court, is not vitiated by the fact that among the items of costs endorsed thereon, the magistrate's fees are shown only by their gross amount. *Griffin v. Dauphin*, 543.
2. *Executions; statute requiring itemized statement of bill of costs applicable to alias and pluries writ.*—The statute requiring that executions shall contain an itemized statement of the bill of costs (Code, § 1883), applies to *alias* and *pluries* writs of execution, as well as original executions; and all executions without such itemized statement of the bill of costs are illegal and void.—*Marks & Gayle v. Wood*, 533.
3. *Same; when items of cost insufficient.*—The statement of costs attached to an execution as follows: "Clerk's fees, * * *; fees on former *fl. fa.*, \$5.75; * * *; Sheriff's fees, * * *; fees on former *fl. fa.*, \$2.05," is not the statement of the several items composing the bill of costs as required by the statute (Code, § 1883); and an execution to which such statement is attached is illegal and void, and the levy of such execution is likewise void.—*Ib.* 533.

EXECUTORS AND ADMINISTRATORS.

1. *Contract by administrator; when invalid; specific performance.* One P. died intestate leaving his estate incumbered with a mortgage. Immediately after their appointment, the administrators of the estate of said P. entered into a contract with the mortgagee for the purpose and intention of paying off and discharging the said mortgage indebtedness. The contract so entered into, after specifying the indebtedness of the estate to the mortgagee in a large amount and that it was evidenced by promissory notes and secured by a mortgage upon the lands of the estate, and further reciting that the mortgagee had agreed to extend the payment, stipulated on the part of the mortgagors, that they would, for a period of seven years, up to the time of the extension agreed to by the mortgagee, turn over to and pay unto the mortgagee all the rents, incomes and profits from the intestate's estate, which were to be used to pay and satisfy first the advances agreed to be made by the mortgagee from year to year during the period stipulated, and then to be used towards the payment and satisfaction of the mortgage debt due by the intestate to the mortgagee. *Held:* That the administrators were without authority to enter into such a contract; that said contract was not binding upon the estate of the intestate, was invalid and could not be specifically enforced against the administrators in their representative capacity.—*Winston Jones & Co. v. Peebles*, 290.
2. *Action by administrator to recover purchase price of lands; sufficiency of complaint.*—In an action by an administrator to recover the purchase price of lands belonging to the intestate's estate, where, by the averments of the complaint, it is shown that the sale of the land was a judicial sale made through the plaintiff, as administrator, under a decree of the probate court, and that such sale had been reported to the court rendering the decree, as was contemplated by the statute under which the sale was had (Code, § 2154), a plea setting up that the sale was at public auction, and that a memorandum of it was not made by the auctioneer, etc., presents no answer to the complaint and is subject to demurrer.—*Cull v. House*, 304.

EXEMPTIONS.

1. *Judgment for statutory penalty; no exemptions allowed against it.*—As against a judgment rendered in a suit brought for the recovery of the statutory penalty for cutting trees upon the lands of another, (Code, § 4137), there is no constitutional or statutory exemptions allowed in this State; such action being an action *ex delicto* for a tort.—*Crawford v. Slaton*, 393.
2. *Exemption; not allowed against costs in an action of tort.*—If in an action of tort, the plaintiff fails in the suit and judgment for costs is rendered against him in favor of the defendant, he can not claim his exemptions as against such judgment. *Ib.* 393.

See HOMESTEAD.

FALSE IMPRISONMENT.

1. *False imprisonment; there can be no recovery for malicious prosecution.*—A complaint which claims damages for "maliciously and without probable cause therefor causing the plaintiff to be arrested and imprisoned on the charge of larceny," is an action of trespass for false imprisonment, and under such complaint there can be no recovery for malicious prosecution.—*Davis v. Sanders*, 275.
2. *Same; same; character of action not changed by amendment.* In such a case, the amendment of a count by adding thereto that "said charge before the commencement of this action has

FALSE IMPRISONMENT—*Continued.*

been judicially investigated and said prosecution ended and the plaintiff discharged," does not change the character of the action.—*Ib.* 275.

3. *Action for false imprisonment; evidence of plaintiff's character not admissible.*—In an action to recover damages for false imprisonment, where the plaintiff's character has not been assailed, proof of his good character is wholly irrelevant to any of the issues involved, and such evidence should be excluded. *Ib.* 275.

FEES.

See SHERIFFS.

FRAUD.

1. *Deed; cancellation for fraud or unfair advantage.*—Where by the practice of fraud upon or the taking of undue advantage of one who is infirm with age and mentally weak, a conveyance of land is obtained for a grossly inadequate consideration, the grantor in said deed or, upon the death of the grantor, the heirs can maintain a bill in equity to rescind said contract of sale and have the deed cancelled and set aside. *Walling v. Thomas*, 426.
2. *Same; same; waiver of right.*—The right to rescind a contract of sale and to have the deed of conveyance cancelled may be waived by the party in whom the right resides, whether he be the party originally injured, or his successor in interest; and while such waiver may be implied from conduct inconsistent with the intention to rescind, as evidenced by long acquiescence in the transaction, the mere delay in instituting proceedings to avoid the deed, is subject to explanation showing that it was not caused by acquiescence in the sale. *Ib.* 426.
3. *Bill to annul proceedings in attachment suit; burden of proof; sufficiency of evidence.*—Where a bill is filed by creditors to have annulled proceedings in an attachment suit, whereby the goods of complainant's debtor were seized and sold, upon the ground that the attachments were sued out by the attaching creditors in collusion with the debtor, without the existence of any statutory ground therefor, and for the purpose of hindering, delaying and defrauding the complainants and other creditors, the burden of proving the charges made is upon the complainant; and where the evidence introduced shows without conflict that the defendant in attachment was indebted to the plaintiffs in said suit and the evidence further tended strongly to show that there was at least probable cause for the issuance of the attachment, the averments of fraud contained in such bill are not sustained, and upon such evidence the complainants are not entitled to relief.—*Adair & Co. v. Feder*, 620.
4. *Attachment; mere fact that the defendant knew of issuance does not show fraud.*—The mere knowledge on the part of the defendant in attachment that the plaintiffs in such suit were purporting to sue out writs of attachment, or a willingness on the part of such defendant that the attachment should be sued out, does not, of itself, raise the presumption that there was a covinous agreement or fraudulent collusion between the plaintiffs and the defendant in suing out the attachment. *Ib.* 620.

FRAUDS, STATUTE OF.

1. *Action by payee of note against endorsers; not necessary for promise of endorser to be in writing.*—The promise of the

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- endorser of a note to pay the same, by which the plaintiff is induced to delay bringing suit to the first term of the court to which suit could be brought, in order to constitute an excuse for not bringing suit to such term of the court, as provided by statute (Code, § 894, subd. 7), need not be in writing; all that is necessary being an express promise on the part of the endorser to pay the debt.—*Brown v. Fowler*, 316.
2. *Endorsement of note; not necessary for the consideration to be expressed.*—The act of endorsement, either in blank or in full, without qualification, forms a new contract between the endorser and the endorsee, and is *prima facie* evidence between the immediate parties of a full and valuable consideration; and the failure of consideration is a matter of defense, the burden of proving which rests upon the one who disputes such consideration.—*Ib.* 310.
 3. *Statute of frauds; how defense presented.*—The statute of frauds, to be available as a defense, must be specially pleaded, and such defense can not be taken advantage of by demurrer.—*Evans v. So. R. Co.*, 482.

FRAUDULENT CONVEYANCES.

1. *Creditor's bill to declare void deed of assignment; to what property lien attaches.*—The lien acquired by the filing of a bill by a creditor without a lien, for the purpose of setting aside a conveyance by his debtor, upon the ground of fraud, attaches only to the property embraced in the fraudulent deed or conveyance, and does not attach to any property excepted from the operation of said deed.—*Long v. Campbell*, 353.
2. *Fraudulent conveyance; deed of assignment to be void must be fraudulent in its inception.*—To declare a deed of assignment void by reason of fraud, it must be shown that fraud entered into the assignment at the time of its execution, since no subsequent acts of the party can invalidate an assignment; and, therefore, if a deed of assignment, made by a creditor for the benefit of his debtors, was in its inception *bona fide* and free from fraud, collusive acts of the grantor and assignor subsequent to its execution will not render such a deed void.—*Ib.* 353.
3. *Deed of assignment; not fraudulent by excepting therefrom homestead of grantor.*—A deed of assignment in which the grantor conveys all of his property of every kind and description "except his homestead in which he now resides," is not rendered fraudulent by reason of such exception. Such exception is not such a reservation of benefit to the debtor as avoids a conveyance by him; and by such exception the homestead is not conveyed and is subject to legal process by the creditors of the grantor just as it was before the making of the deed of assignment.—*Ib.* 353.
4. *Fraudulent conveyance; burden of proof.*—In an action by an existing creditor to set aside a conveyance as fraudulent, the burden of proof is on the complaining creditor to show the existence of his debt; but the existence of the debt being shown and the conveyances being admitted, the burden of proof is on the grantee in the conveyance to show the *bona fides* of the transaction.—*Russell v. Davis*, 647.
5. *Fraudulent conveyance; transactions between relatives; bona fides.*—In determining the *bona fides* of a transaction assailed as fraudulent the fact that such transaction was had between parties nearly related is a circumstance which naturally calls for closer scrutiny than where the transaction is between strangers.—*Ib.* 647.

FRAUDULENT CONVEYANCES—*Continued.*

6. *Fraudulent conveyance; several conveyances to different grantees, how treated; common fraudulent purpose.*—Although conveyances are separate, covering different property, and executed on different dates to several grantees (all brothers of the grantor), yet, if made in pursuance of a purpose common to the grantor and the grantees to defraud the grantor's creditors, they will be regarded and treated as a single transaction, and any fact that would vitiate any one of said conveyances will be visited upon all.—*Ib.* 647.
7. *Fraudulent conveyance; law governing prior to enactment of present statute (Code, 1896, § 2158.)*—Although, prior to the enactment of section 2158 of the Code of 1896, a debtor in failing circumstances or insolvent, had the right to prefer one or more of his creditors over others to the extent of conveying his entire estate, and defeating other creditors in the collection of their debts; yet, to support such conveyance, it must have been absolute and without the reservation of benefit to the grantor; the debt or demand must have been a pre-existing one; and the property conveyed, on a fair and reasonable valuation, and must not have unreasonably exceeded the debt.—*Ib.* 647.
8. *Same; when conveyance held fraudulent as to existing creditors.* A bill filed in equity, for the purpose of having set aside several conveyances as being fraudulent, the following facts were shown: A merchant, being insolvent or in failing circumstances, in the space of forty days made several conveyances to different brothers of property amounting in the aggregate to about ten thousand dollars in value, and being substantially all his visible, tangible assets, outside of his exemptions; and where the grantees knew of the grantor's insolvency, and grantor and grantees were intimate as brothers, and had frequent interviews and conversations during the time covering the making of the transfers; and two of the grantees were at the time in the employment of the grantor, and another had his office in the store where the grantor carried on his merchandise business; and where the books of the grantor offered in evidence showed very suspicious irregularities as to the debts to his brothers and in the order in which they were made and contained a number of erasures; and where there was evidence tending to show that during the time covering the transactions the grantor transferred and sold to one of the grantees choses in action for a present cash consideration; and that the grantor subsequent to the alleged transfers was in the possession of choses in action, embraced in the conveyances, trying to collect same: *Held:* That the grantees and grantor had a common purpose to defraud; that the grantees had not discharged the burden of showing by clear and satisfactory proof the *bona fides* of the transactions assailed; and that the conveyances or transfers were fraudulent as to existing creditors.—*Ib.* 647.

GARNISHMENT.

1. *Garnishment; interposition of claim.*—In response to a writ of garnishment issued upon a judgment, the garnishees answered indebtedness to the defendant, but suggested a third party as claimant. In the claim suit instituted, it appeared that the indebtedness of the garnishees was evidenced by note made to the defendant, that this note was given for the purchase of lands belonging to the defendant's wife, and by mistake was made payable to him; that immediately up-

GARNISHMENT—Continued.

on its delivery to him and before the issuance of the writ of garnishment, the defendant indorsed the note to his wife, who, after the service of the writ of garnishment, transferred and endorsed it to the claimant. *Held*: That the plaintiff in the judgment was not entitled to condemn the amount due from the garnishees on the note to the satisfaction of his judgment. *Jones v. Nolen*, 567.

HIGHWAYS.

1. *Municipal corporation; construction of charter as to power of paving.*—The section of a city charter which provides "that it shall be lawful for said city council from time to time and in such manner as it may determine, to pave, gravel, or macadamize any street, avenue, square, public place or alley in whole or in part within the corporate limits or said city, whenever said city council may deem it necessary or expedient to do so; and for that purpose said city council is hereby authorized and empowered to adopt and provide the means therefor," is sufficiently comprehensive to include and authorize side-walk paving; the term "street" in such connection applying to the whole thoroughfare, including the sidewalk.—*City Council of Montgomery v. Foster*, 587.
2. *Same; assessment for street paving must be in proportion to benefit to abutting property.*—No municipal corporation can, under the constitution, make any assessment for the costs of sidewalk or street paving, or for the costs of the construction of any sewers or the placing of curbing on a sidewalk, against the property abutting on such street or sidewalk so paved or drained, in excess of the increased value of such property, by reason of the special benefits derived from such improvements; and an assessment of the costs of paving levied against the adjacent property without reference to the extent of the benefit to the property, is invalid, will be vacated, and the costs of paving so assessed can not be collected. (*McClellan, C. J., dissenting.*)—*Id.* 587.

HOMESTEAD.

1. *Deed of assignment; not fraudulent by excepting therefrom homestead of grantor.*—A deed of assignment in which the grantor conveys all of his property of every kind and description "except his homestead in which he now resides," is not rendered fraudulent by reason of such exception. Such exception is not such a reservation of benefit to the debtor as avoids a conveyance by him; and by such exception the homestead is not conveyed and is subject to legal process by the creditors of the grantor just as it was before the making of the deed of assignment.—*Long v. Campbell*, 353.

HUSBAND AND WIFE.

1. *Homicide; wife not competent witness for husband.*—On a trial under an indictment for murder, the wife of the defendant is incompetent as a witness for her husband.—*Lide v. State*, 43.
2. *Adultery; admissibility of evidence; competency of husband of woman as witness.*—On the trial of a man under an indictment for adultery, the husband of the woman with whom the defendant was charged with having lived in a state of adultery, and who was separately indicted for the same offense, is a competent witness to prove the unlawful cohabitation between his wife and the defendant.—*Campbell v. State*, 158.
3. *Descent and distribution; when widow is entitled to all the personal property of deceased husband.*—Under the statute,

HUSBAND AND WIFE—*Continued.*

where a person dies intestate and leaves a widow but no children, the widow is entitled to all the personal estate, (Code, § 1462); and the fact that at the time of the death of the husband he and his wife were separated, does not affect the descent and distribution as prescribed by the statute, provided the marriage relation in law continued.—*Nolen v. Doss*, 259.

4. *Final settlement of administration; widow competent witness.* On the final settlement of the administration of decedent's estate, the widow is a competent witness to testify to the fact of her marriage with decedent.—*Ib.* 259.
5. *Bill for a divorce; equity pleading; orders of chancellor for taking further testimony after submission of cause.*—On a bill filed by a husband against his wife for a divorce upon the ground of voluntary abandonment, a decree *pro confesso* was rendered. The cause was then submitted by complainant for decree in vacation upon testimony taken by him. After the submission, the chancellor, for the purpose of informing himself as to whether there existed a defense to the bill, prepared interrogatories to be propounded to the defendant, which he directed the register to have answered. The register obeyed these instructions, but the complainant had no knowledge or notice of the time and place of taking the answers, nor was he given an opportunity to file cross interrogatories, to cross examine the defendant as a witness. *Held*: That in such a proceeding the complainant was denied a right to which he was entitled, and that the answers of the respondent to the interrogatories so propounded should not have been considered by the chancellor as evidence, and that, therefore, a decree, based upon such answer denying to complainant the divorce as prayed for, was erroneous. *Wilkinson v. Wilkinson*, 381.

INDORSEMENTS, INDORSERS AND INDORSEES.

1. *Action against endorser of promissory note; sufficiency of complaint.*—In an action by the payee of a note against endorsers thereon, a complaint which alleges that the defendants endorsed the note, setting the same out *in haec verba*, and it is then averred that in the interim between the maturity of the note and the first term of the court to which suit might have been brought, the defendants had requested the plaintiff not to bring suit against the maker of the note, and expressly promised to pay the debt evidenced by said note, "thereby inducing plaintiff to delay bringing suit" against the maker of said note, and further alleges the institution of the suit against the maker of the note, the recovery of judgment, the issuance of execution upon said judgment and the return thereof "no property found," is sufficient as a complaint by the payee of the note against the endorsers thereon, and is not subject to demurrer.—*Brown v. Fowler*, 310.
2. *Same; same.*—It is no objection to such a complaint that it avers the institution of a suit against the makers of the note, the recovery of judgment therein, the issuance of execution thereon and its return of no property found, and such allegations are not subject to be stricken upon motion based upon the ground that they were immaterial and impertinent to any issue in the case.—*Ib.* 310.
3. *Action by payee of note against endorsers; not necessary for promise of endorser to be in writing.*—The promise of the endorser of a note to pay the same, by which the plaintiff is induced to delay bringing suit to the first term of the court to which suit could be brought, in order to constitute an ex-

INDORSEMENTS, INDORSERS AND INDORSEES—*Continued.*

- cuse for not bringing suit to such term of the court as provided by statute (Code, § 894, subd. 7), need not be in writing; all that is necessary being an express promise on the part of the endorser to pay the debt.—*Ib.* 310.
4. *Endorsement of note; not necessary for the consideration to be expressed.*—The act of endorsement either in blank or in full, without qualification, forms a new contract between the endorser and the endorsee, and is *prima facie* evidence between the immediate parties of a full and valuable consideration; and the failure of consideration is a matter of defense, the burden of proving which rests upon the one who disputes such consideration.—*Ib.* 310.
 5. *Action against endorsee of note; sufficiency of plea.*—In an action by the payee of a note against an endorser thereon, where the complaint alleges that suit was not brought against the maker to the first term of the court to which it could be brought, after the maturity of the note, but that the plaintiff was induced to delay the institution of suit by the promise of the defendant as endorser to pay said note, a plea which sets up that the "alleged promise of the defendant upon which plaintiff relies for recovery as against these defendants, was wholly without consideration," is insufficient as a defense and subject to demurrer.—*Ib.* 310.
 6. *Endorsement; right of accommodation endorser to maintain action against maker.*—Where an endorsement is made upon a negotiable instrument for the accommodation of the payee, such endorser, if compelled to pay, can maintain an action against the maker in the same way as if the instrument had been regularly endorsed by him, and he will accordingly be protected against defenses of which he was ignorant at the time of making the endorsement.—*Andrews v. Meadow*, 442.

INJUNCTION AND INJUNCTION BOND.

1. *Injunction; railroad company can not enjoin ejectment for right of way which has not been paid for, without offering to compensate the owners.*—Where a right of way for a railroad has not been acquired by the railroad company, either by valid conveyance or under condemnation proceedings for such purpose, the railroad company can not maintain a bill to enjoin an action of ejectment brought against it by the owners of the land over which the road was constructed, without offering in the bill to do equity by paying compensation for the lands so used for a right of way; and this principle obtains although the owners of the land may have had knowledge of the location and construction of the railroad company's track across its lands, and allowed it to expend large sums or money for the purpose, without interference.—*Hood v. So. R. Co.*, 374.
2. *Same; fact that some of the owners of the property had conveyed their interest immaterial.*—In such a case, the necessity for offering to do equity by the complainant railroad company is not removed by the fact that some of the owners may have subsequently sold their interest in the lands to persons unknown to the complainant; since the offer to make compensation should be made to the original owners of the land.—*Ib.* 374.
3. *Public nuisance; encroachment upon sidewalk in the erection of a building will be enjoined.*—The encroachment upon a sidewalk in a city by the erection thereon of columns in front of a building adjacent to the said sidewalk, constitutes a public nuisance for the abatement of which, or to enjoin the erection and maintenance of which, a bill in equity can be maintained.—*First Nat. Bank v. Tyson*, 459.

INJUNCTION AND INJUNCTION BOND—*Continued.*

4. *Same; when bill can be maintained by private citizen.*—A private citizen who sustains an injury in the erection and maintenance of a public nuisance, different in degree and kind from that suffered by the general public, can maintain a bill in equity to enjoin the erection and maintenance of such public nuisance.—*Ib.* 459.
5. *Public nuisance; fact that complainant is guilty of obstructing sidewalk no reason why he can not maintain bill to abate public nuisance.*—It is no defense to a bill, filed to enjoin the erection and maintenance of an obstruction upon a sidewalk adjacent to the complainant's property, that the building owned by the complainant itself encroaches upon said sidewalk.—*Ib.* 459.

INSANITY.

1. *Insanity; burden of proof; reasonable doubt.*—When insanity is set up as a defense in a criminal case, the burden is upon the defendant to establish the insanity to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not justify an acquittal.—*Lide v. State*, 43.
2. *Same; what necessary to justify acquittal.*—When insanity is set up as a defense in a criminal case, the defendant must show by a preponderance of the evidence (1) that at the time of the commission of the crime he was afflicted with a disease of the brain, rendering him idiotic or otherwise insane; (2) that being so afflicted he did not know right from wrong as applied to the particular action; (3) if knowing right from wrong, that he had by reason of duress of such mental disease, lost the power to choose between right and wrong, and to avoid doing the act; and (4) that the crime was so connected with such mental disease in the relation of cause and effect as to have been the product of it solely.
Ib. 43.
3. *Homicide; plea of insanity; admissibility of evidence.*—On a trial under an indictment for murder, where the defendant pleads not guilty, and not guilty by reason of insanity, acts and declarations of the defendant subsequent, as well as previous to the killing, are admissible in evidence to show his true mental condition at the time of the homicide.
Cawley v. State, 128.
4. *Same; plea of self defense and insanity; charge to the jury.* On a trial under an indictment for murder, where the defendant pleads not guilty and not guilty by reason of insanity, and the two issues are submitted and tried at the same time, a charge is erroneous and properly refused which instructs the jury that "if the jury believe from the evidence that the defendant committed the act under circumstances which would be criminal or unlawful if he was sane, the verdict should be not guilty, if the killing was an offspring or product of mental disease in the defendant."
Ib. 128.
5. *Same; plea of insanity; charge to the jury.*—On a trial under an indictment for murder, where the defendant pleads not guilty by reason of insanity, a charge is erroneous and properly refused which instructs the jury that even if they should believe from the evidence that the defendant at the time of the killing had the capacity to distinguish between right and wrong, "yet if the jury should believe from the evidence that defendant was moved to action by the insane impulse controlling his will or judgment, then he is not guilty of the offense charged."—*Ib.* 128.

INSTRUMENTS IN WRITING.

See EXECUTION OF WRITTEN INSTRUMENTS.

INSURANCE

1. *Action upon insurance policy; admissibility of evidence.*—When an insured, who has contracted for insurance, informs the agent of the insurance company who is authorized to issue the policy, of his desire to take out a policy of fire insurance upon a house and points out to such agent which house it is, and the agent, in describing the house insured in the policy, makes it uncertain which house is included therein, in an action upon said policy, it is competent for the insured to testify as to whether or not he pointed out to the agent the house that was burned as the one which was to be insured and told him that that was the house upon which he wished the insurance.—*Ala. Mut. F. Ins. Co. v. Minchener*, 632.
2. *Insurance; arbitration clause; result of refusal to comply with provisions by one of the parties.*—Where in a policy of fire insurance, there is contained a provision for arbitration of the amount of the loss in the event of a disagreement as to such amount, if either party, after a disagreement as to the amount of the loss and a request by the other party for arbitration, in bad faith prevent such ascertainment by arbitration by refusing to proceed therewith, or by insisting upon the selection of improper arbitrators, or by undue interference with them after their selection, the other party is thereby absolved from further obligation to arbitrate; and if such fault be attributable to the insured it is a defense to the action on the policy, but if to the insurer, the lack of an award is not available to defeat a recovery on such policy. *Hall & Bro. v. Western Assur. Co.*, 637.
3. *Same; same; same.*—Where the arbitration clause in a policy of fire insurance provides that in the event of a disagreement as to the amount of the loss, the amount of the loss should be ascertained by arbitration, and that the arbitrators should each be "competent and disinterested," if, under the agreement for submission to arbitration under such clause the arbitrator named by the insurer is not disinterested and this fact is known to the insurer, but unknown to the insured, the latter is not bound by the agreement to arbitrate, although the selection of such interested or partial arbitrator was agreed to by him; and under such circumstances the insurer is at liberty to prosecute a suit upon the policy of insurance and the agreement of submission to arbitrate presents no defense to the action.—*Ib.* 637.
4. *Same; same; general affirmative charge.*—Where in an action on a fire insurance policy which contained a provision for arbitration in the event of disagreement as to the amount of the loss, it is shown that the insured and insurer, upon disagreeing as to the amount of the loss, agreed to a submission to arbitration as provided by said clause, and that each selected an appraiser, who, together selected an umpire as provided for, but there was evidence tending to show that the appraiser selected by the insurer was not disinterested, but had been employed by the insurer in many such cases and manifested an unusual interest in behalf of the insurer, showing a bias in its behalf, it is error to give, in such suit, the general affirmative charge requested by the defendant.—*Ib.* 637.

INTEREST.

1. *License tax; interest recoverable.*—Interest is recoverable on unpaid license tax.—*So. Car & F. Co. v. State*, 624.

See USURY.

JUDICIAL SALES.

See SALES.

JURY AND JURORS.

1. *Trial of the right of property; sufficiency of verdict.*—While under the provisions of the statute it is the duty of the jury on the trial of the right of property to assess in their verdict the value of each item of property involved separately, if practicable, (Code, § 4143), if there appears no evidence as to the value of each item of the property, and it is recited in the verdict of the jury that the jury find "the issue in favor of the plaintiff for the property described as per agreement," the fact that the jury fail to assess in their verdict each item of property in controversy separately, does not render such verdict insufficient to support a judgment in favor of the plaintiff, the court presuming under such circumstances that it was either impracticable for the jury to assess such items of the property separately, or that the failure to do so was in accordance with the agreement referred to therein.—*Massillon E. & T. Co. v. Arnold*, 368.

JUDGMENTS AND DECREES.

1. *Action upon attachment bond; plea of set off; when judgment exorbitant.*—In an action upon an attachment bond, where the defendants file a plea of set off, and the evidence shows an indebtedness from the plaintiff to the defendant to the extent of \$275.22, and the actual damages shown by the plaintiff's testimony to have been sustained by him on account of the wrongful suing out of the attachment amounts to \$366.90, a verdict of the jury assessing the plaintiff's damages at \$258.33 is exorbitant; and constitutes a ground for the granting of a new trial.—*Hamilton v. Maxwell*, 233.
2. *Petition for intervention; decree sustaining demurrers thereto will not support appeal.*—Where a petition is filed in a pending suit in equity by a third person in which he asks to be allowed to intervene in said suit, and upon demurrers interposed to such petition the chancellor renders a decree sustaining them, but does not dismiss the petition, such decree is interlocutory and will not support an appeal.—*Walker v. N. G. L. & T. Co.*, 240.
3. *Promissory note; when demand for trial by jury waived, and judgment by default proper without writ of inquiry.*—Where in a suit on a promissory note, after the defendant files pleas accompanied by a demand for a trial by jury, the parties enter into an agreement, wherein it is stipulated that if the amount sued for is not paid within a stipulated time, judgment by default can be rendered for the full amount of the claim with interest, a judgment by default, after the lapse of the stipulated time, ascertaining the debt and damages without a jury, is proper and not subject to objection; said agreement, in effect, withdrawing the pleas, and putting the case on the same footing as if they had never been filed and no demand for a jury had ever been made.—*Peoples I. Co. v. Peoples Nat. Bank*, 248.
4. *Same; judgment under agreement.*—In an action upon a promissory note, where there is an agreement that after the lapse of a specified time there should be a judgment for plaintiff "by default for full amount of the claim sued on and interest to date of judgment and cost of suit," a judgment for more than the amount of the note with interest to date of judgment and the costs of the suit, is erroneous. *Id.* 248.

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JUDGMENTS AND DECREES—Continued.

5. *Appeal; judgment upon motion for new trial not revisable.*—The statute allowing appeals from judgments granting or refusing to grant motions for a new trial, applies only to civil causes in the circuit and city courts, (Code, § 434); and, therefore, the action of the probate court in overruling and refusing to grant a motion for a new trial in a cause pending in such court is not revisable on appeal.—*Beatty v. Hobson*, 270.
6. *Detinue; mortgage of personal property; sufficiency of judgment.* Where in an action of detinue, the plaintiff's right to possession is claimed under a mortgage which was given to secure the performance of a contract, which the mortgagor defendant had failed to perform, if there is a suggestion made upon the record that the suit was by a mortgagee against a mortgagor, as provided by statute (Code, § 1477), and the cause is tried by the court without the intervention of a jury, it is proper for the court in rendering judgment to ascertain the amount of the mortgage debt to the amount expressly stipulated for in the mortgage, as liquidated damages which were to accrue upon the failure of the defendant to perform said contract.—*Eiston v. Roop & Sewell*, 331.
7. *Trial and its incidents; how judgment by court without jury reviewed on appeal.*—Where a case is tried by the court without the intervention of a jury, and the evidence is in conflict, the judgment rendered by the court will not be reversed, unless it is plainly erroneous.—*Laster v. Blackwell*, 337.
8. *Trial of the right of property; sufficiency of verdict.*—While under the provisions of the statute it is the duty of the jury on the trial of the right of property to assess in their verdict the value of each item of property involved separately, if practicable, (Code, § 4143), if there appears no evidence as to the value of each item of the property, and it is recited in the verdict of the jury that the jury find "the issue in favor of the plaintiff for the property described as per agreement," the fact that the jury fail to assess in their verdict each item of property in controversy separately, does not render such verdict insufficient to support a judgment in favor of the plaintiff; the court presuming under such circumstances that it was either impracticable for the jury to assess such items of the property separately, or that the failure to do so was in accordance with the agreement referred to therein.—*Massillon E. & T. Co. v. Arnold*, 368.
9. *Ejectment by tenants in common; proper judgment therein.*—In an action of ejectment, where the plaintiffs and defendants are tenants in common, and the plaintiffs claim an undivided interest in said lands, upon a verdict returned in favor of the plaintiffs, a judgment in their favor declaring that they recover of the defendant the undivided interest sued for in the complaint is proper, and in such case it is not material whether all of the tenants in common are joined in the action.—*Butler v. Butler*, 373.
10. *Judgment for statutory penalty; no exemptions allowed against it.*—As against a judgment rendered in a suit brought for the recovery of the statutory penalty for cutting trees upon the lands of another, (Code, § 4137), there is no constitutional or statutory exemptions allowed in this State; such action being an action *ex delicto* for a tort.—*Crawford v. Slaton*, 393.
11. *New trials; review of judgment granting same.*—When an appeal is taken from an order of the trial court granting a new trial, the Supreme Court will not reverse such judgment, unless the evidence plainly and palpably supports the verdict.—*Merrill v. Brantley & Co.*, 537.

JUDGMENTS AND DECREES—Continued.

12. *Bill for reformation of judgment; equity jurisdiction.*—A bill can not be maintained by one who was a party to an ejectment suit, for the purpose of having the judgment rendered in said suit reformed, so as to make it apply to other lands than those described in said judgment; said judgment being rendered in accordance with the plea of disclaimer and the suggestion of adverse possession for three years filed by the defendant in said ejectment suit, who sought to maintain the bill in equity.—*Meyer v. Calera Land Co.*, 554.

JUSTICES OF THE PEACE.

1. *Appeal from judgment by justice of the peace; not necessary that the paper sent up by the justice should be certified.* Where an appeal is taken from a judgment of a justice of the peace to the circuit court, it is not necessary for the justice of the peace to certify anything; but all that is required by the statute, (Code, § 484), is that he must return all the original papers in the cause, together with the statement of the case and judgment rendered, signed by him.—*Hardee v. Abraham*, 341.
2. *Same; when not necessary for new complaint to be filed; sufficiency of judgment by default.*—When on an appeal taken from a judgment of the justice of the peace, there is included in the original papers returned by the justice to the clerk of the court, to which the appeal is taken, a perfectly good complaint, it is proper for the court to which the appeal is taken to enter upon the trial on that complaint; or, the defendant not appearing, to render judgment by default on that complaint.—*Id.* 341.
3. *Jurisdiction of justice of the peace; waiver of objection.*—On an appeal from a judgment of the justice of the peace, his want of jurisdiction can not be availed of unless the objection thereto was made before the justice of the peace; and the question comes too late if presented for the first time on motion for a new trial in the circuit court where the cause was carried on appeal.—*Clem v. Wise*, 403.
4. *Pleading and practice; when complaint filed in the circuit court no departure from the complaint in justice of the peace court.* Where in a complaint filed in a justice of the peace court the "plaintiff claims of defendant seven hundred pounds of lint cotton on a waive note due and unpaid," an amended complaint filed in the circuit court wherein the "plaintiff claims of the defendant seventy dollars, the value of seven hundred pounds of lint cotton which defendants owe to the plaintiff, and which was due * * * under a written instrument or mortgage," is not a departure from the cause of action stated in the complaint filed in the justice of the peace court.—*Ingram v. Bussey*, 539.
5. *Execution; not void because costs in justice of the peace court were not itemized.*—An execution issued upon a judgment rendered by the circuit court in a cause brought there by appeal from a justice of the peace court, is not violated by the fact that among the items of costs endorsed thereon, the magistrate's fees are shown only by their gross amount.—*Griffin v. Dauphin*, 543.

LANDLORD AND TENANT.

1. *Landlord and tenant; right of stranger to maintain bill.* The attornment of a tenant to a stranger does not, of itself, destroy the possession of the landlord; and when the possession of the rented premises is tortiously gained from the

LANDLORD AND TENANT—*Continued.*

- tenant, or the tenant has been induced to attorn to a stranger, a court of equity will not, on such possession, entertain a bill at the instance of the tort-feasor, or the person attorned to, to remove a cloud from his title to the land.—*Collier v. Carlisle*, 478.
2. *Landlord and tenant; attornment to third person; right of stranger to maintain bill.*—The attornment of a tenant to any other person than his landlord, does not, of itself, destroy the possession of the landlord; and when the possession of the rented premises is tortiously or otherwise gained from the tenant, a court of equity will not, on such possession, entertain a bill at the instance of the tort-feasor, or the person attorned to, to remove a cloud from his title to the rented premises.—*Treadwell v. Torbert*, 504.
 3. *Same; same; same.*—Where a person enters into possession of land as grantee under a deed alleged to have been obtained by duress and fraudulent representations, and leases said premises, the fact that the grantor in said deed subsequently secured the tenants of the grantee to attorn to her and made a contract agreeing to rent said lands to said tenants, does not give said grantor such a possession as will authorize him to maintain a bill in equity to have said deed cancelled and remove as a cloud from her title.—*Ib.* 504
 4. *Sales; effect on the possession of third person through tenant.* Where, at the time of a sale under execution of land in the possession of tenants of a third party who claim under a deed from the defendant in execution, which deed was executed subsequent to the issuance of the execution, the judicial sale of such lands terminates the tenancy; and the attornment of the tenants of said third party to the purchaser has the legal effect of transferring the possession of the lands from such third party to the purchaser, and the right of said third party acquired by his deed from the defendant in execution is thereby defeated; the sheriff's deed to said purchaser conveying such title as the defendant in execution had on the date of its issuance.—*Griffin v. Dauphin*, 543.

LEGACY AND DEVISE.

See WILLS.

LICENSES.

1. *Action for license tax; sufficiency of plea.*—In an action to recover a license or privilege tax, a plea which avers that the defendant "procured a license from the proper authorities to do business in Alabama for the time mentioned in the complaint," is bad and subject to demurrer, in that it does not aver in said plea that the license alleged to have been procured was paid for.—*So. Car & F. Co. v. State*, 624.
2. *Same; same; statute of limitations.*—Under the authority of the statute, (Acts of 1898-99, p. 202, § 16), a suit for the recovery of a license tax can be brought any time within five years from the time the license becomes due; and, therefore, in an action to recover a license tax, pleas setting up the statute of limitations of one and two years as a bar to the action are bad and subject to demurrer.—*Ib.* 624
3. *License tax; sale by one corporation to another does not assign a license.*—The purchase of the stock, property and business of one corporation by another corporation, does not authorize the latter company to do business under a license issued to the former company, nor is the latter company entitled to be credited to the amount of the license tax paid by the

LICENSES—Continued.

selling company on a license tax acquired by the buying company for the years in which the purchase is made. *Ib.* 624.

4. *Same; statute imposing such tax on corporations constitutional.* The statute requiring all corporations, foreign and domestic, doing business in this State, not otherwise specially required to pay a license tax, to pay an annual privilege tax graduated by the paid up capital of the corporation, (Code, § 4122, subd. 55), is the exercise of legitimate authority of the legislature, and such statute is valid and not unconstitutional.—*Ib.* 624.
5. *Same; interest recoverable.*—Interest is recoverable on unpaid license taxes.—*Ib.* 624.

See TAXATION.

LIENS.

1. *Creditor's bill to declare void deed of assignment; to what property lien attaches.*—The lien acquired by the filing of a bill by a creditor without a lien, for the purpose of setting aside a conveyance by his debtor, upon the ground of fraud, attaches only to the property embraced in the fraudulent deed or conveyance, and does not attach to any property excepted from the operation of said deed.—*Long v. Campbell*, 353.

See MORTGAGES AND VENDOR AND PURCHASER.

LIMITATIONS, STATUTE OF

1. *Claim against insolvent estate; objection must be filed within the time fixed by statute.*—Objections to the allowance of a claim against an insolvent estate, upon which issue is to be made up between the claimant and the party interposing the objection under the statute, (Code, § 313), must question the merits or validity of the particular claim for matters separate from its status in respect of its filing; and if such objections are not filed within the time prescribed therefor by the statute, after the declaration of insolvency, all defenses existing or occurring within that period are barred.—*Christopher v. Stewart*, 348.
2. *Statute of limitations.*—The statute of limitations does not run against a claim which has been filed against an insolvent estate; hence where an objection to such claim is based on the statute of limitations and is filed after the time prescribed by the statute for filing objections, the bar created by the latter statute is not avoided by a statement annexed to such objection that the objection arose after the claim was filed. *Ib.* 348.
3. *License tax; statute of limitations.*—Under the authority of the statute, (Acts of 1898-99, p. 202, § 16), a suit for the recovery of a license tax can be brought any time within five years from the time the license becomes due; and, therefore, in an action to recover a license tax, pleas setting up the statute of limitations of one and two years as a bar to the action are bad and subject to demurrer.—*So. Car. Co. v. State*, 624.

LUNATICS.

See INSANITY.

MALICIOUS PROSECUTION.

1. *False imprisonment; there can be no recovery for malicious prosecution.*—A complaint which claims damages for "maliciously and without probable cause therefor causing the plaintiff to be arrested and imprisoned on the charge of larceny."

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- is an action of trespass for false imprisonment, and under such complaint there can be no recovery for malicious prosecution.—*Davis v. Sanders*, 275.
2. *Malicious prosecution; constituents of sufficient complaint.*—An averment of the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof, is essential to constitute a count for malicious prosecution. *Ib.* 275.
 3. *Action for malicious prosecution; admissibility of evidence.*—In an action against the Southern Express Company to recover damages for malicious prosecution, where the principal issue in the case was as to whether the defendant had instigated or encouraged the prosecution of the plaintiff for robbing an express car, inquiries and statements addressed by the detective or special agent of the defendant to a witness, after the plaintiff had been arrested and before his discharge, concerning plaintiff's movements and expenditure of money recently after the robbery, are competent and admissible in evidence as indicating that the defendant employed efforts to obtain evidence for use in said prosecution.—*So. Express Co. v. Couch*, 285.
 4. *Same; same.*—In such a case, it is competent for the plaintiff on cross examination of the person who swore out the warrant for his arrest, to show that the special agent or detective in the employment of the defendant expressed the opinion to such person that he had sufficient evidence to convict the plaintiff of the robbery charged.—*Ib.* 285.
 5. *Same; same.*—In such a case, it is competent for the defendant to show that the person, upon whose affidavit the warrant of arrest of the defendant was sued out, before making said affidavit and suing out such warrant, submitted fully and fairly all the facts in regard to plaintiff's guilt to a reputable practicing attorney, and was by him advised that the evidence was sufficient to justify plaintiff's conviction; such evidence having a tendency to show that the prosecution of the plaintiff was by such person independent of defendant's influence. *Ib.* 285.

MANDAMUS.

1. *Mandamus; assignee of decree can not compel the issuance of restraining order to sheriff out of another court than the one rendering the decree.*—Where, after the levy of an execution issued upon a decree rendered by a chancery court, the complainant is said suit assigns the decree, and upon the request of the assignee to release the levy of said execution, the sheriff refuses to do so, the assignee of such decree can not, by filing a petition for *mandamus* in another court, obtain a writ commanding the sheriff to release said levy and restraining him from selling or attempting to sell the property levied upon.—*State ex rel. Scott v. Waller*, 199.
2. *Mandamus; Supreme Court has no jurisdiction to issue mandamus directed to board of registrars.*—The Supreme Court has no original jurisdiction to issue a writ of *mandamus* directed to the board of registrars of a county, to compel such board to register the petitioner as an elector; such board of registrars not being one of the jurisdictions which the Supreme Court can, under the constitution (Constitution 1901, § 140), control by original writs.—*Ex parte Giles*, 211.
3. *Mandamus; when issued to correct erroneous rulings.*—While ordinarily it is not the office of a writ of *mandamus* to reverse judicial action, but to compel such action, yet a writ of

MANDAMUS—Continued.

- mandamus* will lie to correct an erroneous ruling of a court, where injury results and there exists no right of appeal or other adequate means of redress.—*Ex parte Jones*, 212.
4. *Mandamus; there must be averred a demand for the performance of the act and the refusal thereof as a condition to the filing of the application.*—To entitle a petitioner to the extraordinary writ of *mandamus*, he must show that he has a clear right to the performance of the act or the duty demanded, and he must aver in his petition that he had made a demand upon the respondent, and that the respondent had neglected or refused to comply therewith; and in the absence of such an averment, a petition for *mandamus* is defective and should be dismissed.—*Moseley v. Collins*, 326.
 5. *Mandamus; when will not lie from Supreme Court to probate judge.*—The Supreme Court has no power to grant a writ of *mandamus* to the probate judge, when there has been no application to the circuit court or other court having power to grant the writ.—*Christopher v. Stewart*, 348.

MASTER AND SERVANT.

1. *Master and servant; when employee cannot complain of injuries received; contributory negligence.*—Where an employee is himself the agent through whom the employer undertakes to see that the ways, works, machinery and plant are in proper condition, and the employee undertakes that responsibility, he can not complain of personal injuries sustained by him by reason of defects in the condition of such ways, works, etc.; his negligence contributing proximately to the injuries complained of.—*Pioneer M. & M. Co. v. Thomas*, 279.
2. *Master and servant; liability of master for personal injuries to servant.*—In an action by an employee against his employer to recover damages for personal injuries sustained while in the employ of the defendant, it was shown that the defendant was engaged in clearing the right of way for a railroad and grading and building said railroad. The plaintiff, who was a deaf mute, was engaged with a number of other employees of defendant in such work, and had been so engaged for several days when the accident happened. While deaf, the plaintiff's sight was unimpaired. Among other work that was being done, trees were being felled along the right of way. While the plaintiff was engaged in shoveling dirt on the side of the railroad bridge, and his back was towards some of the other employees who were cutting down a tree, the tree fell on the plaintiff and inflicted the injuries complained of. A fellow servant of the plaintiff, who was at work with him at the time of the injury, under the direction of the defendant's superintendent, attempted to save the plaintiff from the falling tree by pushing him, but was unable to do so. *Held*: There was no duty shown on the part of the defendant to the plaintiff which was violated, and no negligence shown for which the defendant was responsible; and, therefore, the defendant was entitled to the general affirmative charge. *Melton v. Jackson Lumber Co.*, 580.
3. *Action by employee against employer; contributory negligence.* In an action by an employee against a cotton mill company to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the superintendent of such cotton mill in directing the plaintiff to put a belt upon a pulley which, at the time, was in motion, and making three or four hundred revolutions per minute, where the evidence shows plaintiff was an experienced mill man, had worked for

MASTER AND SERVANT—*Continued.*

a long time in the mill in which his injuries were received, and in the capacity of foreman of the section of the mill in which he was hurt, and he knew all about putting belting upon pulleys in motion, the fact that the plaintiff obeyed the orders of the superintendent in attempting to put the belt upon the pulley while in motion, if there was danger in making such attempt, showed such want of care and prudence on the plaintiff's part—such negligence contributing to his own injury—as to constitute a full defense against the alleged negligence of the superintendent in giving the direction.—*Coosa Manfg. Co. v. Williams*, 606.

4. *Same; sufficiency of evidence showing negligence.*—In an action against a cotton mill company to recover damages for personal injuries sustained by the plaintiff while he was attempting to put a belt upon a pulley which was in motion and making between three and four hundred revolutions a minute, one of the counts of the complaint charged that the superintendent of the defendant's mill negligently ordered another employe to raise the belt with a pole while the plaintiff was engaged in putting in on the pulley, and that in carrying out such order the other employe raised the belt in such manner as to cause it to lap and double around the revolving shaft, on which was the pulley, and as a result of the lapping and doubling of the belt, the plaintiff's arm was caught therein and inflicted the injury complained of. The evidence showed that the superintendent had directed the other employe to raise the belt with a pole, but there was a total lack of evidence to show that the lapping and doubling of the belt was a necessary or a probable result of lifting the belt with a pole, or that such result could have been within the reasonable apprehension of an ordinarily careful superintendent. *Held*: That such evidence was not sufficient to support the charge that the superintendent was guilty of negligence in giving the order to the other employe to raise the belt, and that, therefore, the plaintiff was not entitled to recover upon such count.—*Id.* 606.

MORTGAGES.

1. *Mortgage of personal property; when conveys title to agent and gives him right to maintain detinue.*—Where a mortgage of personal property is given to certain named persons described therein as agents of a third party, the certain named parties as mortgagees acquired title to said property and can maintain an action of detinue against the mortgagors upon default being made by them.—*Elston v. Roop & Sewell*, 331.
2. *Mortgage of personal property; right of possession thereunder; detinue; admissibility in evidence.*—A mortgage of personal property, in the absence of a stipulation to the contrary, vests in the mortgagee a right to immediate possession; and when such mortgage is given to secure the performance of a contract, if the mortgagor fails to perform the contract, the mortgagee can maintain an action of detinue for the mortgaged property, and said mortgage is not rendered inadmissible in evidence by the non-production of the contract, the performance of which was intended to be secured by the execution of the mortgage.—*Id.* 331.
3. *Mortgage securing several debts; application of proceeds of sale.*—Where a mortgage is given to secure several notes, upon two of which there is a surety who was not a party to the mortgage, upon the foreclosure of the mortgage, the mortgagee must see that a just proportion of the proceeds of the sale is applied to the discharge of the notes upon which the

MORTGAGES—*Continued.*

surety is bound, and the portion of the proceeds at such sale applicable to the debt on which the surety is bound will be credited as a payment *pro tanto* on such debt, and the surety to that extent discharged.—*Bostick v. Jacobs*, 344.

4. *Action of detinue; when sufficient transfer of mortgage.*—In an action of detinue, where the plaintiff claims the property sued for under a mortgage alleged to have been transferred to him by a corporation, which mortgage was shown to have been lost, and the president of the corporation testified that he delivered and transferred to the plaintiff said mortgage, but did not write out any transfer thereof on the back of the mortgage until after the suit was brought, such evidence is sufficient to carry to the jury the question whether or not the plaintiff was the legal owner of the mortgage.—*Clem v. Wise*, 403.
5. *Assignment of mortgage; right of transferee to maintain suit for mortgaged property.*—Under a transfer which is not merely of the debt, but which is appropriate to pass title to the security, the transferee can maintain a suit at law for the mortgaged property.—*Ib.* 403.
6. *Evidence; admissibility of mortgage in action of assumpsit.*—In an action of assumpsit, wherein the plaintiff claims the value of a certain number of pounds of lint cotton, which it is averred in the complaint defendant owed plaintiff under a written instrument or mortgage made by the defendant, the mortgage referred to in the complaint is admissible in evidence; and it is no valid objection to the introduction of such mortgage in evidence that the plaintiff had not shown that it was given for a *bona fide* subsisting debt.—*Ingram v. Bussey*, 539.
7. *Foreclosure of mortgage; when decree failing to pass upon claim under adverse possession proper.*—Under a bill filed for the sole purpose of the foreclosure of a mortgage, where it is alleged that the mortgagor died intestate, and the parties defendant are the sole heirs of the deceased mortgagor, but one of the defendants sets up in her answer a title to the mortgaged property claimed to have been derived by adverse possession, a decree providing for the divestiture by foreclosure of all the interest in the mortgaged property shown by the bill to be in the defendants as heirs at law of the deceased mortgagor, but falls and declines to pass upon the alleged title of the defendant claimed by adverse possession, expressly excepting from its operation any interest said defendants may have had in the mortgaged property, independent of the mortgagor, is proper and free from error; the bill not assailing the title of said defendants claimed to have been derived through adverse possession.—*Equit. M. Co. v. Finley*, 575.
8. *Same; same.*—In such a case, the purpose of the foreclosure suit being not to determine in whom the title resides, but to settle the interest claimed or existing in subordination to the mortgage, the defendant asserting the title by adverse possession was a proper party defendant, and the bill should not have been dismissed as to her; since, being an heir of the mortgagor, she took an equity of redemption, and the foreclosure of that interest was necessary to the enforcement of the mortgage.—*Ib.* 575.
9. *Equitable assignment and subrogation; when shown to exist.* Where one who, though having no previous interest and being under no obligation, pays off a mortgage or advances money for its payment at the instance of the mortgagor, and for his

MORTGAGES—Continued.

benefit, such person is in no true sense a stranger and volunteer, but is, under the doctrine of equitable assignment, entitled to be subrogated to the lien of said mortgage for the reimbursement of the amount paid thereon.—*Motes v. Robertson*, 630.

10. *Mortgage to secure advances of money paid for mortgagor; when modification binding.*—Where the surety on a bond executes a note and mortgage to his co-surety for the purpose of securing the latter, in the payment of one-half of a designated amount to be paid by him in effecting the compromise of a judgment rendered against them, and the plaintiff in said judgment declines to accept said amount, it is competent for the mortgagor and mortgagee to modify the agreement so as to change the application of the money provided for by the note and mortgage; and upon the mortgagee subsequently effecting a compromise of said judgment by paying a larger amount than the sum stipulated in said mortgage, which was done with the mortgagor's consent and approval, said note and mortgage constitute a valid and binding obligation, and the consideration therefor did not fail and the mortgage thereby become extinguished when the first offer of compromise was rejected and the sum returned to the mortgagee. *Sheats v. Scott*, 642.

MORTGAGEE AND MORTGAGOR.

1. *Right of redemption; junior mortgagee.*—A prior mortgagee in attempting a foreclosure of a mortgage under the power of sale contained therein, purchased at said sale without authority being given him in the mortgage to so purchase. The junior mortgagee within two weeks after said unauthorized purchase disaffirmed said sale and tendered to the prior mortgagee the amount paid by him, together with interest and all lawful charges and asked to be allowed to redeem. This tender was refused and the prior mortgagee declined to allow the junior mortgagee to redeem. *Held*: Such facts present a case of seasonable disaffirmance of the sale and purchase by the prior mortgagee, and entitles the junior mortgagee to redeem the property conveyed in the mortgage. *Douthitt v. Nabors*, 453.
2. *Bill by junior mortgagee to redeem; should offer to do equity.* Where a bill is filed by a junior mortgagee against the holder of a senior mortgage and seeks an accounting from him and the foreclosure of the mortgage held by the complainant, and that the complainant be allowed to redeem, it is necessary that such bill should offer to pay such sum as may be ascertained to be due upon the first mortgage; and in the absence of such offer the bill is subject to demurrer.—*Higman v. Humes*, 617.
3. *Same; necessary that second mortgage should be due and payable.*—One of the essential requisites of maintaining such a bill is that the mortgage debt of the complainant should be due and payable; and if the bill filed for such purpose does not aver that the complainant's mortgage is due and payable at the time of the filing thereof, it is subject to demurrer. *Ib.* 617.

MOTION DOCKET.

1. *Pleading and practice; how motions considered on appeal.*—The motion docket of the circuit court is not a record of that court, and a ruling by said court upon a motion spread upon the motion docket can not be reviewed on appeal, unless the motion is incorporated in the bill of exceptions, or the trans-

MOTION DOCKET—*Continued.*

cript shows that said motion was enrolled upon the records of the circuit court by an order thereof.—*Craig v. Etheredge*, 284.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, SUB-TITLE.

NEGOTIABLE INSTRUMENTS.

1. *Endorsement; right of accommodation endorser to maintain action against maker.*—Where an endorsement is made upon a negotiable instrument for the accommodation of the payee, such endorser, if compelled to pay, can maintain an action against the maker in the same way as if the instrument had been regularly endorsed by him, and he will accordingly be protected against defenses of which he was ignorant at the time of making the endorsement.—*Andrews v. Meadow*, 442.

NEGLIGENCE

1. *Action against telegraph company; when negligence a question for the jury.*—In an action by one who was traveling along a public road against a telegraph company, to recover for personal injuries alleged to have been caused by reason of the defendant's negligence in allowing a wire charged with electricity to be or remain on or a short distance above the road, whereby the traveling public along said road were liable to be injured, and the defendant by special plea sets up that it exercised reasonable care to prevent its wires from becoming detached from its poles, and that it did not know and by the exercise of reasonable care could not have known that the wires had become detached from the pole, until after the injury to the plaintiff, and where the evidence for the plaintiff tends to show that at the point where the injury was alleged to have been caused the wire owned and operated by the defendant had become disengaged from the pole to which it was attached, by reason of the cross pole being rotten, and that the wire had been detached for two days or more before the injury complained of was inflicted, it is a question for the jury whether due care alleged had been proved, or whether due care had been exercised to discover and remedy the defective condition of the wire; and, therefore, the general affirmative charge requested by the defendant is properly refused.—*Postal Tel. Cable Co. v. Jones*, 217.
2. *Same; same; charge to the jury.*—In such a case, a charge is properly refused which instructs the jury as follows: "That although the jury may find from the evidence that the cross arm which it appears from the evidence was detached from the pole at the point of defendant's line where the alleged injury occurred was rotten, or partially rotten, yet, in this case no recovery can be had because of such alleged rotten or partially rotten cross arm."—*Ib.* 217.
3. *Action for negligence; charge of court as to failure to call in physician.*—In an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, a charge is erroneous and properly refused which instructs the jury "that if they find from the evidence that no doctor was employed by the plaintiff to treat his alleged injuries, the jury may look to this fact, if found from the evidence to be a fact, as a circumstance tending to show that plaintiff was not seriously hurt at the time and place named in the complaint and evidence."—*Ib.* 217.

NEGLIGENCE—Continued.

4. *Master and servant; liability of master for personal injuries to servant.*—In an action by an employe against his employer to recover damages for personal injuries sustained while in the employ of the defendant, it was shown that the defendant was engaged in clearing the right of way for a railroad and grading and building said railroad. The plaintiff, who was a deaf mute, was engaged with a number of other employes of defendant in such work, and had been so engaged for several days when the accident happened. While deaf, the plaintiff's sight was unimpaired. Among other work that was being done, trees were being felled along the right of way. While the plaintiff was engaged in shoveling dirt on the side of the railroad bridge, and his back was towards some of the other employes who were cutting down a tree, the tree fell on the plaintiff and inflicted the injuries complained of. A fellow servant of the defendant, who was at work with him at the time of the injury, under the direction of the defendant's superintendent, attempted to save the plaintiff from the falling tree by pushing him, but was unable to do so. *Held:* There was no duty shown on the part of the defendant to the plaintiff which was violated, and no negligence shown for which the defendant was responsible; and, therefore, the defendant was entitled to the general affirmative charge.—*Melton v. Jackson Lumber Co.*, 580.
5. *Same; sufficiency of evidence showing negligence.*—In an action against a cotton mill company to recover damages for personal injuries sustained by the plaintiff while he was attempting to put a belt upon a pulley which was in motion and making between three and four hundred revolutions a minute, one of the counts of the complaint charged that the superintendent of the defendant's mill negligently ordered another employe to raise the belt with a pole while the plaintiff was engaged in putting on the pulley, and that in carrying out such order putting it on the pulley, and that in carrying out such order the other employe raised the belt in such a manner as to cause it to lap and double around the revolving shaft, on which was the pulley, and as a result of the lapping and doubling of the belt, the plaintiff's arm was caught therein, and inflicted the injury complained of. The evidence showed that the superintendent had directed the other employe to raise the belt with a pole, but there was a total lack of evidence to show that the lapping and doubling of the belt was a necessary or a probable result of lifting the belt with a pole, or that such result could have been within the reasonable apprehension of an ordinarily careful superintendent. *Held:* That such evidence was not sufficient to support the charge that the superintendent was guilty of negligence in giving the order to the other employe to raise the belt, and that, therefore, the plaintiff was not entitled to recover upon such count.—*Coosa Manfg. Co. v. Williams*, 606.

I. CONTRIBUTORY NEGLIGENCE.

6. *Master and servant; when employe cannot complain of injuries received; contributory negligence.*—Where an employe is himself the agent through whom the employer undertakes to see that the ways, works, machinery and plant are in proper condition, and the employe undertakes that responsibility, he can not complain of personal injuries sustained by him by reason of defects in the condition of such ways, works, etc.; his negligence contributing proximately to the injuries complained of.—*Pioneer M. & M. Co. v. Thomas*, 279.
7. *Contributory negligence; sufficiency of plea.*—In an action against a railroad company by an employe to recover dam-

NEGLIGENCE—Continued.

ages for personal injuries, a plea which avers that "the plaintiff's own negligence proximately contributed to the injuries complained of," is too general and subject to demurrer. A plea of contributory negligence should aver facts constituting the contributory negligence interposed as a defense.—*So. R. Co. v. Jackson*, 384.

8. *Sufficiency of plea of contributory negligence.*—In an action by a passenger against a street railway company to recover damages alleged to have been sustained by him when alighting from one of the cars of the defendant, which injuries were alleged to have been sustained by reason of the defendant stepping in or upon a pile of lumber negligently placed by the defendant near its track, a plea which avers "that when the car stopped the lights from the car shone for ten or twelve feet on either side of the track, and that plaintiff could have seen the alleged lumber and debris before he stepped thereon, by the exercise of ordinary and reasonable care on his part," is insufficient as a plea of contributory negligence, in that it does not aver that the plaintiff failed to exercise ordinary and reasonable care, or that he saw the lumber.—*Montgomery St. R. Co. v. Mason*, 508.
9. *Same; same.*—In such a case, a plea which avers that the defendant "stepped from said car without knowing or inquiring of the defendant or its agent as to whether or not the situation was reasonably safe for him to alight where said car was stopped," is insufficient as a plea of contributory negligence, and is demurrable.—*Ib.* 508.
10. *Same; same.*—In such a case, a plea which alleged that the "plaintiff voluntarily alighted therefrom without requesting the defendant or his agent to carry him back to the regular stopping place, and without ascertaining before he alighted from said car, that he was alighting at a safe place, is insufficient as a plea of contributory negligence and demurrable.—*Ib.* 508.
11. *Same; same.*—In such an action a plea seeking to set up contributory negligence on the part of the plaintiff which avers that the plaintiff boarded said car of the defendant knowing that it was being operated without any one to look after the safety of his alighting, and that he, plaintiff, "alighted from said car without first ascertaining or attempting to ascertain that he was at a safe place to alight therefrom," is insufficient and subject to demurrer.—*Ib.* 508.
12. *Street railroad company; duty as to passenger.*—Street railway companies are under a duty of exercising the highest degree of diligence and care to conserve the safety of their passengers, and this duty extends to and includes the safe landing of passengers at the termination of their journey or ride; and for failure to stop one of its cars at a place safe for a passenger to alight, or in stopping its car at a dangerous place, a street railway company is liable for damages sustained by a passenger by reason of such failure or by reason of a passenger alighting at such dangerous place.—*Ib.* 508.
13. *Action by employe against employer; contributory negligence.* In an action by an employe against a cotton mill company to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the superintendent of such cotton mill in directing the plaintiff to put a belt upon a pulley which, at the time, was in motion, and making three or four hundred revolutions per minute, where the evidence

NEGLIGENCE—*Continued.*

shows plaintiff was an experienced mill man, had worked for a long time in the mill in which his injuries were received, and in the capacity of foreman of the section of the mill in which he was hurt, and he knew all about putting belting upon pulleys in motion, the fact that the plaintiff obeyed the orders of the superintendent in attempting to put the belt upon the pulley while in motion, if there was danger in making such attempt, showed such want of care and prudence on the plaintiff's part—such negligence contributing to his own injury—as to constitute a full defense against the alleged negligence of the superintendent in giving the direction. *Coosa Manfg. Co. v. Williams*, 606.

NEW TRIALS.

1. *Where motion for new trial not revisable.*—The ruling of the trial court on motion for a new trial in a criminal case is not reversible on appeal.—*Durrett v. State*, 119; *Hampton v. State*, 180.
2. *Trial and its incidents; new trial can not be granted because court gave charge at the request of movant.*—Where in the trial of a cause, there is judgment rendered for the plaintiff, it constitutes no ground for the granting of a new trial, that the court at the request of the defendant gave a charge in its behalf.—*Postal Tel. Cable Co. v. Jones*, 217.
3. *New trial; properly refused.*—The judgment of a trial court refusing a new trial on the ground that the evidence is not sufficient to support the verdict, or that the verdict is contrary to the evidence, will not be reversed unless, after allowing all reasonable presumption of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it is wrong and unjust. *Bir. So. R. R. Co. v. Cuzzart*, 262.
4. *Appeal; judgment upon motion for new trial not revisable.*—The statute allowing appeals from judgments granting or refusing to grant motions for a new trial, applies only to civil causes in the circuit and city courts, (Code, § 434); and, therefore, the action of the probate court in overruling and refusing to grant a motion for a new trial in a cause pending in such court is not reversible on appeal. *Beatty v. Hobson*, 270.
5. *Trial and its incidents; admissibility of evidence relating to the manner of arriving at verdict by jury on motion for a new trial.*—On a motion for a new trial, evidence by the jurors who tried a case as to the manner of their arriving at a verdict, is inadmissible in evidence.—*Montgomery St. R. Co. v. Mason*, 508.
6. *New trials; review of judgment granting same.*—When an appeal is taken from an order of the trial court granting a new trial, the Supreme Court will not reverse such judgment, unless the evidence plainly and palpably supports the verdict. *Merrell v. Brantley*, 537.

NON COMPOS MENTIS.

See INSANITY.

NUISANCES.

1. *Public nuisance; encroachment upon sidewalk in the erection of a building will be enjoined.*—The encroachment upon a sidewalk in a city by the erection thereon of columns in front of a building adjacent to the said sidewalk, constitutes a public nuisance for the abatement of which, or to enjoin the erection and maintenance of which, a bill in equity can be maintained.—*First Nat. Bank v. Tyson*, 459.

NUISANCES—*Continued.*

2. *Same; when a bill can be maintained by private citizen.*—A private citizen who sustains an injury in the erection and maintenance of a public nuisance, different in degree and kind from that suffered by the general public, can maintain a bill in equity to enjoin the erection and maintenance of such public nuisance.—*Ib.* 459.
3. *Easement of view a valuable right and can be preserved.*—An easement of view or prospect from every part of a public street is like light and air, a valuable right of which the owner of a building abutting on a street can not be deprived by an encroachment upon the street by a coterminous or adjacent proprietor; and to enjoin the erection and maintenance of a building which would obstruct the enjoyment of such right the owner of a building can maintain a bill in equity.—*Ib.* 459.
4. *Same; municipal authorities can not grant the right to maintain public nuisance.*—The authorities of a municipality have no power to authorize the encroachment upon a sidewalk by the erection and maintenance thereon of a part of a building; and it is not a condition precedent to the maintenance of a bill to enjoin the erection and maintenance of such obstruction, that the complainant, who owned the adjacent or coterminous building had applied, without success, to the authorities of the city for relief.—*Ib.* 459.
5. *Public nuisance; fact that complainant is guilty of obstructing sidewalk no reason why he can not maintain bill to abate public nuisance.*—It is no defense to a bill, filed to enjoin the erection and maintenance of an obstruction upon a sidewalk adjacent to the complainant's property, that the building owned by the complainant itself encroaches upon said sidewalk.—*Ib.* 459.
6. *Bill to enjoin public nuisance; when plea bad for duplicity.* Where a bill is filed to enjoin the erection and maintenance of a part of a building which encroaches upon a sidewalk in a city, upon the ground that it was a public nuisance and obstructed the complainant's enjoyment of light, air and view, a plea which sets up that the complainant who owned the adjacent building consented to the encroachment upon the sidewalk, and which further sets up as a defense that the complainant was not entitled to have the light, air and view come to his building from that part of the street in front of defendant's building, to which the defendant has a fee, is bad for duplicity.—*Ib.* 459.
7. *Nuisance; when bill can be maintained by private citizen for its abatement.*—A nuisance which operates to destroy the health of a family or to seriously diminish the comfortable enjoyment of a dwelling house, is productive of irreparable damage and mischief, for which the law furnishes no adequate remedy; and a person whose health or the comfort of whose house is damaged and affected thereby, may maintain a bill for the purpose of abating such nuisance.—*Richards v. Daugherty*, 569.
8. *Same; same; mill dam.*—Where the erection of dams or other obstructions which materially affect the natural flow of a running stream, results in the injury to the health of persons living in the neighborhood, or in the vicinity, such dam or obstruction, constitutes a nuisance, and may be abated by bill in equity at the suit of a person, the health of whose family is injured thereby, without waiting the trial of the issue of the nuisance *vel non* by an action at law.—*Ib.* 569.

NUISANCES—*Continued.*

9. *Same; same; same.*—Where a bill is filed to have a mill dam abated as a nuisance, upon the ground that it results in producing ill health in the family of the complainant and in the vicinity contiguous to the dam, the fact that the malaria which caused the ill health complained of was generated in part by other causes than the mill dam, constitutes of itself no defense to the maintenance of the bill, if it is further shown that the existence of the mill dam materially contributed to the condition naturally existing, producing malaria, and intensified or made more poisonous the malaria generated by other causes.—*Id.* 569.
10. *Action to abate mill dam as a nuisance; estoppel.*—When a bill is filed seeking to have abated as a nuisance a mill dam, the facts that the complainant at the time of the erection of said dam consulted with the defendant and advised him as to the manner of its erection and was aware that the defendant was expending money in the construction of said dam, and the mill which was to be operated by the pond caused from the dam, do not work an estoppel upon the complainant to maintain such bill, upon the ground that the maintenance of such dam produced ill health to the family of the complainant and of other people in the vicinity; and such facts constitute no defense to such bill.—*Id.* 569

OFFICE AND OFFICERS.

See SHERIFFS.

PARTNERSHIP.

1. *Bill for settlement of partnership when complainant not entitled to relief.*—Where a co-partnership was formed between individuals and a partnership, and after the dissolution of the co-partnership the partnership member of said firm files a bill seeking to have an accounting and settlement of said partnership, averring that although there had been a dissolution there had never been a settlement of the partnership affairs, and the individual member of said partnership in his answer admits the dissolution and denies that there had not been a settlement, and sets out facts going to show such settlement, and the evidence shows that after the dissolution there was a settlement of the partnership affairs between the individual member thereof and one of the firm constituting the other member, and that this member of the firm had the active management and control of said firm's business, and that the firm member of the partnership accepted the results of this settlement, the evidence in such case is insufficient to sustain the averments of the bill, but shows that the settlement of the partnership affairs had been had after its dissolution, and that, therefore, the complainant was not entitled to the relief prayed for.—*Shows v. Folmar Sons & Co.*, 599.

PAYMENTS.

1. *Mortgage securing several debts; application of proceeds to sale.*—Where a mortgage is given to secure several notes, upon two of which there is a surety who was not a party to the mortgage, upon the foreclosure of the mortgage, the mortgagee must see that a just proportion of the proceeds of the sale is applied to the discharge of the notes upon which the surety is bound, and the portion of the proceeds at such sale applicable to the debt on which the surety is bound will be credited as a payment *pro tanto* on such debt, and the surety to that extent discharged.—*Bostick v. Jacobs*, 344.

PLEADING AND PRACTICE.

1. *Action against telegraph company for personal injuries; sufficiency of complaint.*—In an action against a telegraph company by one who was traveling along the public highway, to recover damages for personal injuries received as the result of a wire used by the defendant having fallen across the public road, where the complaint alleges that the team which was attached to the vehicle in which he was riding, came in contact with said wire, and by reason thereof became unmanageable and the plaintiff was thrown from the wagon and fell upon said wire and received the injuries complained of, and it was averred that the defendant owned and operated said telegraph wire which was heavily charged with electricity "and it became and was the duty of the defendant to use due care to have and keep said wire high up from said road, yet, notwithstanding said duty defendant negligently caused or allowed said wire to be or remain on, or such a short distance above, said public highway that the public traveling said highway were liable to be injured thereby," sufficiently charges a cause of action and is not subject to demurrer upon that ground, or upon the further ground that it fails to show the duty on the part of the defendant to keep its wire out of the way of travelers along the public road.—*Postal Tel. Cable Co. v. Jones*, 217.
2. *Pleading and practice; when demurrer to special pleas properly sustained.*—Special pleas which set up matters simply in denial of the cause of action, as contained in the complaint, and interpose no ground of defense which can not be set up under the plea of the general issue, are subject to demurrer. *Ib.* 217.
3. *Pleading and practice; how motion considered on appeal; bill of exceptions.*—The ruling of the trial court upon a motion to require the plaintiff to pay certain costs as a condition to the further prosecution of his action will not be reviewed on appeal, unless the motion is incorporated in the bill of exceptions; and it is not sufficient for the presentation of the rulings upon such motion that a copy thereof appears as a part of the record in the transcript.—*Hamilton v. Maxwell*, 233.
4. *Action upon attachment bond; plea of set off; when judgment exorbitant.*—In an action upon an attachment bond, where the defendants file a plea of set off, and the evidence shows an indebtedness from the plaintiff to the defendant to the extent of \$275.22, and the actual damages shown by the plaintiff's testimony to have been sustained by him on account of the wrongful suing out of the attachment amounts to \$366.90, a verdict of the jury assessing the plaintiff's damages at \$258.38 is exorbitant; and constitutes a ground for the granting of a new trial.—*Ib.* 233.
5. *Action against railroad company for personal injuries; sufficiency of complaint.*—In an action against a railroad company by an employee to recover damages for personal injuries, a complaint which alleges that while the plaintiff was engaged in the performance of his duties, the defendant's engineer, naming him, "who was in charge and control and superintendence of said engine," negligently moved said engine at a dangerous rate of speed up to and against a car on the track of the defendant, by reason of which the coupling pin on said car was thrown with great force against the face of the plaintiff who was standing upon the running board of the engine for the purpose of coupling said car, and by reason of such blow the plaintiff suffered the injury complained of,

PLEADING AND PRACTICE—Continued.

- states a cause of action under subdivision 5 of section 1749 of the Code.—*Btr. So. R. Co. v. Cuzzart*, 262.
6. *False imprisonment; there can be no recovery for malicious prosecution.*—A complaint which claims damages for "maliciously and without probable cause therefor causing the plaintiff to be arrested and imprisoned on the charge of larceny," is an action of trespass for false imprisonment, and under such complaint there can be no recovery for malicious prosecution.—*Davis v. Sanders*, 275.
 7. *Same; same; character of action not changed by amendment.* In such a case, the amendment of a count by adding thereto that "said charge before the commencement of this action has been judicially investigated and said prosecution ended and the plaintiff discharged," does not change the character of the action.—*Id.* 275.
 8. *Malicious prosecution; constituents of sufficient complaint.*—An averment of the issuance of process, properly describing it, and the plaintiff's arrest and imprisonment by virtue thereof, is essential to constitute a count for malicious prosecution.—*Id.* 275.
 9. *Pleading and practice; how motions considered on appeal.*—The motion docket of the circuit court is not a record of that court, and a ruling by said court upon a motion spread upon the motion docket can not be reviewed on appeal, unless the motion is incorporated in the bill of exceptions, or the transcript shows that said motion was enrolled upon the records of the circuit court by an order thereof.—*Craig v. Etheredge*, 284.
 10. *Action by administrator to recover purchase price of lands; sufficiency of complaint.*—In an action by an administrator to recover the purchase price of lands belonging to the intestate's estate, where, by the averments of the complaint, it is shown that the sale of the land was a judicial sale made through the plaintiff, as administrator, under a decree of the probate court, and that such sale had been reported to the court rendering the decree, as was contemplated by the statute under which the sale was had (Code, § 2154), a plea setting up that the sale was at public auction, and that a memorandum of it was not made by the auctioneer, etc., presents no answer to the complaint and is subject to demurrer.—*Cull v. House*, 304.
 11. *Same; same.*—In such a case, the sale being a judicial one, a plea setting up the misrepresentation of the administrator while acting as the agent of the court in making the sale, as to the quantity of the land sold, presents no defense to the action, the maxim of *caveat emptor* applying to such a sale.—*Id.* 304.
 12. *Same; same.*—In such a case, a plea averring that the sale referred to in the complaint was never confirmed by the probate court ordering said sale, and for this reason he never became liable to plaintiff on account of said purchase, is bad and presents no defense to the action.—*Id.* 304.
 13. *Action against endorsee of note; sufficiency of plea.*—In an action by the payee of a note against an endorser thereon, where the complaint alleges that suit was not brought against the maker to the first term of the court to which it could be brought, after the maturity of the note, but that the plaintiff was induced to delay the institution of suit by the promise of the defendant as endorser to pay said note, a plea which sets up that the "alleged promise of the defendant upon which plaintiff relies for recovery as against these defendants, was wholly without consideration," is insufficient as a defense and subject to demurrer.—*Brown v. Fowler*, 310.

PLEADING AND PRACTICE—Continued.

14. *Action against endorser of promissory note; sufficiency of complaint.*—In an action by the payee of a note against endorsers thereon, a complaint which alleges that the defendants endorsed the note, setting the same out *in haec verba*, and it is then averred that in the interim between the maturity of the note and the first term of the court to which suit might have been brought, the defendants had requested the plaintiff not to bring suit against the maker of the note, and expressly promised to pay the debt evidenced by said note, "thereby inducing plaintiff to delay bringing suit" against the maker of said note, and further alleges the institution of the suit against the maker of the note, the recovery of judgment, the issuance of execution upon said judgment and the return thereof "no property found," is sufficient as a complaint by the payee of the note against the endorsers thereon, and is not subject to demurrer.—*Ib.* 310.
15. *Same; same.*—It is no objection to such a complaint that it avers the institution of a suit against the makers of the note, the recovery of judgment therein, the issuance of execution thereon and its return of no property found, and such allegations are not subject to be stricken upon motion based upon the ground that they were immaterial and impertinent to any issue in the case.—*Ib.* 310.
16. *Detinue; sufficiency of plea.*—In an action of detinue, a plea that "defendant further suggests that the title to suit is partly based upon a mortgage," presents no material issue, and should, upon motion, be stricken from the file.—*Elston v. Roop & Sewell*, 331.
17. *Same; same.*—In such action, a plea which attempts only to set up fraud in the execution of the mortgage covering the property sued for by the defendants to the plaintiffs, without showing that plaintiff's title to or right to recover the property depended upon or was affected by the alleged fraud, presents no defense to the action and is subject to demurrer and motion to strike.—*Ib.* 331.
18. *Action against railroad company for injury to a horse; sufficiency of complaint.*—In an action against a railroad company, a complaint which "claims of the defendant the sum of seventy-five dollars as damages for that on or about the day of August, 1900, defendant negligently caused one horse, the property of plaintiff, to run into a trestle on defendant's railroad and thereby injured it so that it was worthless," states a cause of action, and is not subject to demurrer upon the ground that it fails to state or show that the defendant owed the plaintiff any duty in respect of the animal, and that its averments of negligence were too vague and indefinite. *A. G. S. R. R. Co. v. Hall*, 362.
19. *Action against railroad company; sufficiency of complaint.*—In an action against a railroad company, a count of the complaint in the following words: "The plaintiff who sues as the administrator of the estate of James C. Julian, deceased, claims of the defendant corporation the sum of twenty-five thousand dollars as damages for the negligent killing of plaintiff's intestate, a minor less than eleven years of age, by running against and over the plaintiff's intestate with an electric car, which said killing occurred on or about the 22d day of June, 1900," is insufficient and subject to demurrer. *Gadsden & Attalla Un. R. Co. v. Julian*, 371.
20. *Action against railroad company for negligence; sufficiency of complaint.*—In an action against a railroad company by an employee to recover damages for personal injuries sustained

PLEADING AND PRACTICE—Continued.

while the plaintiff was in the employ of the defendant, a complaint which avers that at the time of receiving the injuries sustained the plaintiff was in the discharge of his duties as conductor of a switch engine, and while assisting in getting out cars from the yard of the defendant, then avers that after said cars had been coupled up, he gave a signal to the engineer to pull out, and then "got on a ladder on the end of one of the cars at or near the rear end of said train of cars, preparatory to riding to another part of the yard of the defendant, as it was his duty to do to discharge his duties as such conductor. * * * whereupon said engineer [naming him] negligently did something unknown to plaintiff, but known to such person, which caused said car, upon which plaintiff was holding to by the ladder thereon, to give a violent and sudden jerk or lurch which caused plaintiff to be jerked or thrown off of said car and ladder and under said train of cars, whereby he was injured," sufficiently states a cause of action.—*So. R. Co. v. Jackson*, 384.

21. *Same; contributory negligence; sufficiency of plea.*—In an action against a railroad company by an employe to recover damages for personal injuries, a plea which avers that "the plaintiff's own negligence proximately contributed to the injuries complained of," is too general and subject to demurrer. A plea of contributory negligence should aver facts constituting the contributory negligence interposed as a defense.—*Ib.* 384.
22. *Pleading and practice; pleading over after demurrer sustained; error without injury.*—Where it appears that the defendant, after demurrers were sustained to his original plea, had, under an amended plea, the benefit of all defenses he was entitled to make under the original plea, the rulings of the court in sustaining the demurrer to the original plea, if erroneous, is error without injury.—*Ib.* 384.
23. *Pleading and practice; error without injury; appeal.*—Where in the trial of a case after the plaintiff's demurrers to special pleas are overruled, and his replications to the special pleas are stricken from the file, he declines to take issue on the special pleas and takes issue on the plea of the general issue, but introduced no evidence in support of his complaint, any error in the rulings of the court on the pleadings are without injury, and he can not have such rulings reviewed on appeal.—*Cross v. Esslinger*, 409.
24. *Usury; how pleaded.*—When the defense of usury is interposed by plea or answer, the terms and nature of the alleged usurious agreement must be stated with clearness and definiteness; and the averments in the answer to a bill to foreclose a mortgage that "said note and mortgage is usurious and void for the interest, and respondent here plead the same," is wholly insufficient to present the issue of usury.—*Clark v. Johnson*, 432.
25. *Same; bona fide purchaser.*—Where one claims under a mortgage as a bona fide purchaser for value and without notice, and there is usury in the debt, the fact of usury may be shown without plea of usury.—*Ib.* 432.
26. *Same; effect of usury as to bona fide purchaser.*—An agreement to pay usury upon a debt secured by a mortgage, so infects and taints the transaction as to preclude the mortgagee from being a bona fide purchaser without notice.—*Ib.* 432.
27. *Pleading and practice; when ruling upon demurrer without injury.*—Where a special plea sets up no matter in defense which is not available under the plea of the general issue, and

PLEADING AND PRACTICE—*Continued.*

- amounts to nothing more than a denial of the plaintiff's cause of action, if error occurs in sustaining a demurrer to such plea, it is error without injury.—*N., C. & St. L. R. v. Bates*, 447.
29. *Same; insufficient pleas.*—In an action by a passenger against a railroad company to recover damages for the alleged wrongful ejection of plaintiff from the defendant's train, several pleas seeking to set up a defense to the action, which do not deny the allegations of the complaint and are not good as pleas in confession and avoidance, are insufficient and subject to demurrer.—*Ib.* 447.
29. *Statute of frauds; how defense presented.*—The statute of frauds, to be available as a defense, must be specially pleaded, and such defense can not be taken advantage of by demurrer.—*Evans v. So. R. Co.*, 482.
30. *Pleading and practice; actions ex delicto and ex contractu can not be joined.*—A complaint which contains a count in case, which is *ex delicto*, and another count which is in assumpsit, is subject to demurrer for misjoinder of actions.—*Ib.* 482.
31. *Same; when complaint is in assumpsit and not in case.*—In an action against a railroad company to recover damages for the loss of hogs, a count of the complaint, which after averring that the stock were killed by being run over by a train operated on the defendant's road, then avers that the defendant had contracted with the plaintiff that, in consideration of the construction of a right of way over plaintiff's lands, it would keep the railroad fenced on both sides through plaintiff's lands and keep and maintain cattle guards at the boundary of plaintiff's lands, and that while the defendant had constructed such fences and cattle guards, it carelessly and negligently allowed the same to get out of repair and become destroyed, and that by reason of such failure and negligence of duty on the part of defendant the plaintiff's stock entered upon the defendant's railroad track and was killed, states a cause of action in assumpsit. (Tyson, J., dissenting, holds that such count states a cause of action in case.—*Ib.* 482.
32. *Pleading and practice; when error in rulings of trial court upon the pleadings will not work reversal.*—Unless it affirmatively appears that the refusal of a trial court to strike immaterial and irrelevant averments from the complaint results in injury to the defendant, such refusal, although erroneous, does not constitute a reversible error.—*Montgomery St. R. Co. v. Mason*, 508.
33. *Same; when error in ruling upon motion to strike certain portions of the complaint without injury.*—Where, in an action to recover damages for personal injuries, the defendant moved to strike certain parts of the complaint as being immaterial averments and merely surplusage, which motion the court overruled, and after such ruling on the part of the court the plaintiff amends the complaint by striking out the part thereof to which the motion to strike was directed, no injury results to the defendant in overruling the motion, and such ruling by the trial court, although erroneous, does not constitute a reversible error.—*Ib.* 508.
34. *Action against street railway company; sufficiency of complaint.* In an action against a street railway company by a passenger to recover damages for personal injuries, a count of the complaint which, after averring that it was the duty of the defendant to provide proper and sufficient places for the

PLEADING AND PRACTICE—*Continued.*

plaintiff, one of its passengers, to alight from its cars, then avers that the defendant, without regarding said duty, "failed to provide proper and sufficient place for plaintiff so to alight," and stopped its car on which plaintiff was a passenger at a point where defendant had negligently placed certain lumber and debris within a few feet of its track, by reason whereof the plaintiff, while attempting to alight from said car, at said place, stepped and fell upon said lumber and thereby received the injuries complained of, sufficiently states a cause of action and is not subject to demurrer. *Ib.* 508.

35. *Same; same.*—In such a case, a count of the complaint which avers that it was the duty of the plaintiff to use proper care to have its car stopped at the usual place provided for passengers to alight at the station to which plaintiff was going, then avers that the defendant disregarding its said duty "did not stop said car at the usual stopping place where plaintiff could with safety have alighted from said car, although signalled by plaintiff in ample time to do so, but ran said car beyond said regular stopping place, a distance of about thirty feet, at a place where lumber and other obstructions were lying on the ground, and where there was no light to apprise plaintiff of the situation, and then and there stopped said car in the midst of said lumber," and plaintiff believing that said car had stopped at the usual place, attempted to alight therefrom and stepped and fell upon said lumber or other obstructions, among which the defendant had negligently and carelessly stopped said car, and thereby the plaintiff sustained the injuries complained of, states a sufficient cause of action, and is not subject to demurrer.—*Ib.* 508.
36. *Same; sufficiency of plea of contributory negligence.*—In an action by a passenger against a street railway company to recover damages alleged to have been sustained by him when alighting from one of the cars of the defendant, which injuries were alleged to have been sustained by reason of the defendant stepping in or upon a pile of lumber negligently placed by the defendant near its track, a plea which avers "that when the car stopped the lights from the car shone for ten or twelve feet on either side of the track, and that plaintiff could have seen the alleged lumber and debris before he stepped thereon, by the exercise of ordinary and reasonable care on his part," is insufficient as a plea of contributory negligence, in that it does not aver that the plaintiff failed to exercise ordinary and reasonable care, or that he saw the lumber.—*Ib.* 508.
37. *Same; same.*—In such a case, a plea which avers that the defendant "stepped from said car without knowing or inquiring of the defendant or its agent as to whether or not the situation was reasonably safe for him to alight where said car was stopped," is insufficient as a plea of contributory negligence, and is demurrable.—*Ib.* 508.
38. *Same; same.*—In such a case, a plea which alleged that the "plaintiff voluntarily alighted therefrom without requesting the defendant or his agent to carry him back to the regular stopping place, and without ascertaining before he alighted from said car, that he was alighting at a safe place, is insufficient as a plea of contributory negligence and demurrable. *Ib.* 508.
39. *Same; same.*—In such an action a plea seeking to set up contributory negligence on the part of the plaintiff which avers

PLEADING AND PRACTICE—*Continued.*

that the plaintiff boarded said car of the defendant knowing that it was being operated without any one to look after the safety of his alighting, and that he, plaintiff, "alighted from said car without first ascertaining or attempting to ascertain that he was at a safe place to alight therefrom," is insufficient and subject to demurrer.—*Ib.* 508.

40. *Action upon contract to pay property; what necessary to maintain suit.*—In a contract to pay property or for the delivery of personal property, an action for the value of the property can not be maintained until there has been a demand made for the property and a refusal or failure to deliver it, unless it be shown that such demand would have been futile; and a complaint upon such a contract which alleges neither demand nor refusal, nor any facts which would have excused the making of it, is faulty and subject to demurrer.—*Ingram v. Bussey*, 539.
41. *Pleading and practice; when complaint filed in the circuit court no departure from the complaint in justice of the peace court.* Where in a complaint filed in a justice of the peace court the "plaintiff claims of defendant seven hundred pounds of lint cotton on a waive note due and unpaid," an amended complaint filed in the circuit court wherein the "plaintiff claims of the defendant seventy dollars, the value of seven hundred pounds of lint cotton which defendants owe to the plaintiff, and which was due * * * under a written instrument or mortgage," is not a departure from the cause of action stated in the complaint filed in the justice of the peace court.—*Ib.* 539.
42. *Action by city to recover fine imposed by mayor; complaint not demurrable for claiming amount paid.*—Where, on an appeal taken from a conviction before the mayor for the violation of a city ordinance, a complaint is filed by the city, the fact that in such complaint the city claimed the amount of the fine imposed on the defendant by the mayor, does not render it demurrable.—*Mayor & Ald. v. Fitzpatrick*, 613.
43. *Action for license tax; sufficiency of plea.*—In an action to recover a license or privilege tax, a plea which avers that the defendant "procured a license from the proper authorities to do business in Alabama for the time mentioned in the complaint," is bad and subject to demurrer, in that it does not aver in said plea that the license alleged to have been procured was paid for.—*So. C. & F. Co. v. State*, 624.
44. *Same; same; statute of limitations.*—Under the authority of the statute, (Acts of 1898-99, p. 202, § 16), a suit for the recovery of a license tax can be brought any time within five years from the time the license becomes due; and, therefore, in an action to recover a license tax, pleas setting up the statute of limitations of one and two years as a bar to the action are bad and subject to demurrer.—*Ib.* 624.

POSSESSION.

See ADVERSE POSSESSION.

PROBATE COURTS.

See COURTS, SUB-TITLE.

PROMISSORY NOTES.

1. *Action against endorser of promissory note; sufficiency of complaint.*—In an action by the payee of a note against endorsers thereon, a complaint which alleges that the defendants endorsed the note, setting the same out, *in haec verba*, and it is

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PROMISSORY NOTES—*Continued.*

then averred that in the interim between the maturity of the note and the first term of the court to which suit might have been brought, the defendants had requested the plaintiff not to bring suit against the maker of the note, and expressly promised to pay the debt evidenced by said note, "thereby inducing plaintiff to delay bringing suit" against the maker of said note, and further alleges the institution of the suit against the maker of the note, the recovery of judgment, the issuance of execution upon said judgment and the return thereof "no property found," is sufficient as a complaint by the payee of the note against the endorers thereon, and is not subject to demurrer.—*Brown v. Fowler*, 310.

2. *Same; same.*—It is no objection to such a complaint that it avers the institution of a suit against the makers of the note, the recovery of judgment therein, the issuance of execution thereon and its return of no property found, and such allegations are not subject to be stricken upon motion based upon the ground that they were immaterial and impertinent to any issue in the case.—*Id.* 310.
- 3 *Action by payee of note against endorers; not necessary for promise of endorser to be in writing.*—The promise of the endorser of a note to pay the same, by which the plaintiff is induced to delay bringing suit to the first term of the court to which suit could be brought, in order to constitute an excuse for not bringing suit to such term of the court as provided by statute (Code, § 894, subd. 7), need not be in writing; all that is necessary being an express promise on the part of the endorser to pay the debt.—*Id.* 310.

RAILROADS.

1. *Action against railroad company for personal injuries; sufficiency of complaint.*—In an action against a railroad company by an employee to recover damages for personal injuries, a complaint which alleges that while the plaintiff was engaged in the performance of his duties, the defendant's engineer, naming him, "who was in charge and control and superintendence of said engine," negligently moved said engine at a dangerous rate of speed up to and against a car on the track of the defendant, by reason of which the coupling pin of said car was thrown with great force against the face of the plaintiff who was standing upon the running board of the engine for the purpose of coupling said car, and by reason of such blow the plaintiff suffered the injury complained of, states a cause of action under subdivision 5 of section 1749 of the Code.—*Bir. So. R. R. Co. v. Cuzzart*, 262.
2. *Action against a railroad company; admissibility of evidence.* In an action against a railroad company by an employee to recover for personal injuries, where the complaint alleges that by reason of certain stated negligence on the part of the engineer the coupling pin ' was thrown with great force against the plaintiff's face, striking him near his eye, whereby serious injury was inflicted on the plaintiff, his right eye being permanently impaired," and "from which plaintiff has suffered great mental and physical pain and anguish," it is competent for the plaintiff to introduce testimony showing that from the stroke of the pin he had suffered pain, in having headaches, and in having pains darting through his head in the region of the eye.—*Id.* 262.
3. *Same; same.*—In such a case, where the plaintiff had testified that since the injury described in the complaint, his eyes or one of them, had in consequence of such injury been inflamed

RAILROADS—*Continued.*

and weak, it is not competent for the defendant, on cross examination of the plaintiff, to prove the condition of the eyes of the plaintiff's father and mother, or of his brothers and sisters.—*Ib.* 262.

4. *Charge to the jury; properly refused when assuming the truth of the testimony of a particular witness.*—A charge to the jury which assumes as absolutely true the testimony of a particular witness introduced, and the absolute correctness of the opinion of such witness, who was examined as an expert, is properly refused.—*Ib.* 262.
5. *Action against railroad company; charge to the jury.*—In an action against a railroad company by an employee to recover damages for personal injuries, where there was evidence showing that the plaintiff had been continuously at work receiving practically the same wages since the day of the accident, it is not erroneous for the court to refuse to give to the jury charges instructing them that the plaintiff had been able since his injury to earn approximately as much money as he had before.—*Ib.* 262.
6. *Action against railroad company for injury to a horse; sufficiency of complaint.*—In an action against a railroad company, a complaint which "claims of the defendant the sum of seventy-five dollars as damages for that on or about the.... day of August, 1900, defendant negligently caused one horse, the property of plaintiff, to run into a trestle on defendant's railroad and thereby injured it so that it was worthless," states a cause of action, and is not subject to demurrer upon the ground that it fails to state or show that the defendant owed the plaintiff any duty in respect of the animal, and that its averments of negligence were too vague and indefinite. *A. G. S. R. R. Co. v. Hall*, 362.
7. *Same; duty of engineer upon seeing horse running in front of train.*—Where a horse frightened by an advancing train ran directly towards a trestle of a railroad in front of a train, and the surroundings were such that he would probably continue his flight along the track and into the trestle, if the train continued to advance, the engineer, seeing these things, owes the owner of such horse the duty of stopping the train and thereby removing the cause of the flight of the animal; and the railroad company is liable for injuries resulting to the horse, if the engineer negligently fails to discharge this duty. *Ib.* 362.
8. *Same; same; case at bar.*—In an action against a railroad company to recover damages for injuries to a horse which ran into a trestle of the defendant's railroad, where there was evidence tending to show that the train on the defendant's road was moving towards a trestle on the roadway, and plaintiff's horse was running on the track between the engine and the trestle, apparently frightened by the train, that the track at that place was upon an embankment, several feet high, and the train was 30 to 50 yards behind the horse and going faster than he was, and that the engineer was aware of the situation and did not seasonably stop or check the speed of the train, which if he had done the horse would not have continued his flight into the trestle, and the injury to him would have been averted, the general affirmative charge requested by the defendant is properly refused.—*Ib.* 362.
9. *Same; same; what necessary to authorize plaintiff's recovery.* In such a case, before the plaintiff is entitled to recover, it is necessary for the jury to be reasonably satisfied that the horse ran into the trestle in consequence of the continued advance of the train.—*Ib.* 362.

RAILROADS—*Continued.*

10. *Action against railroad company; sufficiency of complaint.*—In an action against a railroad company, a count of the complaint in the following words: "The plaintiff who sues as the administrator of the estate of James C. Julian, deceased, claims of the defendant corporation the sum of twenty-five thousand dollars as damages for the negligent killing of plaintiff's intestate, a minor less than eleven years of age, by running against and over the plaintiff's intestate with an electric car, which said killing occurred on or about the 22d day of June, 1900," is insufficient and subject to demurrer. *Gadsden & Attalla Un. R. Co. v. Julian*, 371.
11. *Injunction; railroad company can not enjoin ejectment for right of way which has not been paid for, without offering to compensate the owners.*—Where a right of way for a railroad has not been acquired by the railroad company, either by valid conveyance or under condemnation proceedings for such purpose, the railroad company can not maintain a bill to enjoin an action of ejectment brought against it by the owners of the land over which the road was constructed, without offering in the bill to do equity by paying compensation for the lands so used for a right of way; and this principle obtains although the owners of the land may have had knowledge of the location and construction of the railroad company's track across its lands, and allowed it to expend large sums of money for the purpose, without interference.—*Hood v. So. R. Co.*, 374.
12. *Same: fact that some of the owners of the property had conveyed their interest immaterial.*—In such a case, the necessity for offering to do equity by the complainant railroad company is not removed by the fact that some of the owners may have subsequently sold their interest in the lands to persons unknown to the complainant; since the offer to make compensation should be made to the original owners of the land. *Ib.* 374.
13. *Action against railroad company for negligence; sufficiency of complaint.*—In an action against a railroad company by an employe to recover damages for personal injuries sustained while the plaintiff was in the employ of the defendant a complaint which avers that at the time of receiving the injuries sustained the plaintiff was in the discharge of his duties as conductor of a switch engine, and while assisting in getting out cars from the yard of the defendant, then avers that after said cars had been coupled up, he gave a signal to the engineer to pull out, and then "got on a ladder on the end of one of the cars at or near the rear end of said train of cars, preparatory to riding to another part of the yard of the defendant, as it was his duty to do to discharge his duties as such conductor, * * * whereupon said engineer [naming him] negligently did something unknown to plaintiff, but known to such person, which caused said car, upon which plaintiff was holding to by the ladder thereon, to give a violent and sudden jerk or lurch which caused plaintiff to be jerked or thrown off of said car and ladder and under said train of cars, whereby he was injured," sufficiently states a cause of action.—*So. R. Co. v. Jackson*, 384.
14. *Same; contributory negligence; sufficiency of plea.*—In an action against a railroad company by an employe to recover damages for personal injuries, a plea which avers that "the plaintiff's own negligence proximately contributed to the injuries complained of," is too general and subject to demurrer. A plea of contributory negligence should aver facts constituting the contributory negligence interposed as a defense. *Ib.* 384.

RAILROADS—*Continued.*

15. *Railroad; when complaint is in assumpsit and not in case.*—In an action against a railroad company to recover damages for the loss of hogs, a count of the complaint, which after averring that the stock were killed by being run over by a train operated on the defendant's road, then avers that the defendant had contracted with the plaintiff that, in consideration of the construction of a right of way over plaintiff's lands, it would keep the railroad fenced on both sides through plaintiff's lands and keep and maintain cattle guards at the boundary of plaintiff's lands, and that while the defendant had constructed such fences and cattle guards, it carelessly and negligently allowed the same to get out of repair and become destroyed, and that by reason of such failure and negligence of duty on the part of defendant the plaintiff's stock entered upon the defendant's railroad track and was killed, states a cause of action in assumpsit. (Tyson, J., *dissenting*, holds that such count states a cause of action in case.)—*Evans v. So. R. Co.*, 482.
16. *Railroad company; effect of agreement with land owner to build and maintain fences and cattle guards.*—An agreement by a railroad company with a land owner that it will build and maintain fences and cattle guards in consideration of the latter's grant of a right of way, is *prima facie* binding on the company to pay the land owner for injuries to stock entering on the track of the railroad company in consequence of the company's failure to maintain the fences and cattle guards in accordance with the terms of the contract. *Ib.* 482.
17. *Same; same; action for breach thereof.*—In an action against a railroad company to recover damages to the plaintiff's stock, resulting from the breach of a contract entered into between the plaintiff and the defendant, by which the railroad company agreed to build and maintain fences and cattle guards through the land of the plaintiff, it is unnecessary for the complaint to aver when the contract was first broken; since the breaches may be several and continuous.—*Ib.* 482.
18. *Liability of railroad company as common carrier and as warehouseman.*—When a railroad company receives goods for transportation, transports them to the point of destination and informs the consignee of their arrival and affords him a reasonable opportunity to remove them, its duty and liability as a common carrier cease, and if the goods are then left in its custody, its liability for subsequent loss or damage is that of warehouseman only.—*Frederick v. L. & N. R. Co.*, 486.
19. *Same; same; when recovery can not be had on a claim against a railroad company as common carrier.*—In an action against a railroad company for the loss of goods, where the complaint declares against the defendant as a common carrier, a recovery can not be had upon proof of the loss which occurred after the defendant's duty and liability as a common carrier had terminated, and while the goods had been left in its custody as a warehouseman.—*Ib.* 486.
20. *Action against railroad company as bailee; burden of proof.*—In an action against a railroad company to recover for the loss of goods, under a count which seeks to recover against the defendant as a voluntary bailee, the burden is upon the plaintiff to show negligence on the part of the defendant; and in the absence of proof showing negligence, the plaintiff is not entitled to recover. *Ib.* 485.

RAILROADS—Continued.

I. STREET RAILROADS.

21. *Action against street railway company; sufficiency of complaint.*
In an action against a street railway company by a passenger to recover damages for personal injuries, a count of the complaint which, after averring that it was the duty of the defendant to provide proper and sufficient places for the plaintiff, one of its passengers, to alight from its cars, then avers that the defendant, without regarding said duty, "failed to provide proper and sufficient place for plaintiff so to alight," and stopped its car on which plaintiff was a passenger at a point where defendant had negligently placed certain lumber and debris within a few feet of its track, by reason whereof the plaintiff, while attempting to alight from said car, at said place, stepped and fell upon said lumber and thereby receiving the injuries complained of, sufficiently states a cause of action and is not subject to demurrer. *Montgomery St. R. Co. v. Mason*, 508.
22. *Same; same.*—In such a case, a count of the complaint which avers that it was the duty of the plaintiff to use proper care to have its car stopped at the usual place provided for passengers to alight at the station to which plaintiff was going, then avers that the defendant disregarding its said duty "did not stop said car at the usual stopping place where plaintiff could with safety have alighted from said car, although signaled by plaintiff in ample time to do so, but ran said car beyond said regular stopping place, a distance of about thirty feet, at a place where lumber and other obstructions were lying on the ground, and where there was no light to apprise plaintiff of the situation, and then and there stopped said car in the midst of said lumber," and plaintiff believing that said car had stopped at the usual place, attempted to alight therefrom and stepped and fell upon said lumber or other obstructions, among which the defendant had negligently and carelessly stopped said car, and thereby the plaintiff sustained the injuries complained of, states a sufficient cause of action, and is not subject to demurrer.—*Ib.* 508.
23. *Street railroad company; duty as to passenger.*—Street railway companies are under a duty of exercising the highest degree of diligence and care to conserve the safety of their passengers, and this duty extends to and includes the safe landing of passengers at the termination of their journey or ride; and for failure to stop one of its cars at a place safe for a passenger to alight, or in stopping its cars at a dangerous place, a street railway company is liable for damages sustained by a passenger alighting at such dangerous place.—*Ib.* 508.
24. *Action against street railway company; hospital fees paid by plaintiff recoverable; admissibility of evidence.*—In an action against a street railway company to recover damages resulting from personal injuries, hospital fees, including the expenses of a ward in a hospital and a nurse, paid by the plaintiff while seeking recovery from the injuries sustained, constitute an element of recoverable damages by the plaintiff; and such items of expense incurred by the plaintiff are admissible in evidence.—*Ib.* 508.
25. *Deposition under the statute; should be suppressed when taken before only one of two named commissioners.*—Where, in a civil case, interrogatories are filed under the statute (Code, § 1835), and the commission issued by the clerk names two persons as commissioners, and the certificate attached to the deposition taken under said commission is signed by only one

RAILROADS—*Continued.*

of the commissioners, and recites that he alone took the deposition of the witness to whom the interrogatories were propounded, and the adverse party is shown not to have waived the absence of the other commissioner, the taking of the deposition by only one of the commissioners was invalid, and upon a motion properly made, the deposition so taken will be suppressed; and this is true although it was not shown why the absent commissioner did not act, and there was no evidence that he did not have notice as required by the statute, but it was shown that the commissioner who acted was suggested by the party propounding the interrogatories and the name of the other commissioner was inserted in the commission upon the suggestion of the adverse party. (DOWDELL, J., *dissenting.*) *Id.* 508.

26. *Damages for personal injuries; when not shown to be excessive.* In an action against a street railway company, to recover damages for personal injuries, where it is shown that by reason of the injuries sustained the plaintiff's right arm was paralyzed and the injury resulted in his being sick and disabled for several months, and being subjected to heavy expenses for medical and hospital fees, and had suffered great mental and physical pain, and was prevented from performing the duties of his occupation for several months, a verdict assessing his damages at \$2,300 can not be said to be excessive.—*Id.* 508.

RECEIVER.

1. *Ejectment against receiver; can not be maintained without consent of court making appointment.*—Where a receiver, in obedience to an order of the court appointing him, goes into possession of land and holds it subject to the control of the court, a third party claiming to be the owner of said land and who was ousted by the receiver, can not maintain an action of ejectment against such receiver to recover possession of the land, without the consent or order of the court by which the appointment was made.—*Baker v. Carraway*, 502.

REDEMPTION.

1. *Statutory right of redemption; sufficiency of tender.*—One of the conditions precedent to the exercise of the statutory right of redemption from a sale under a mortgage, is the payment or tender to the purchaser by the mortgagor of the purchase money with ten *per centum* thereon and all lawful charges (Code, § 3507); and the fact that the purchaser at the foreclosure sale has within the time allowed for redemption sold a part of the land so purchased by him and received payment therefor, does not excuse the redemptioner from paying the full amount of the purchase money with ten *per cent.* and all other lawful charges, in order to entitle him to exercise the statutory right.—*Burke v. Brewer*, 389.
2. *Right of redemption; junior mortgagee.*—A prior mortgagee in attempting a foreclosure of a mortgage under the power of sale contained therein, purchased at said sale without authority being given him in the mortgage to so purchase. The junior mortgagee within two weeks after said unauthorized purchase disaffirmed said sale and tendered to the prior mortgagee the amount paid by him, together with interest and all lawful charges and asked to be allowed to redeem. This tender was refused and the prior mortgagee declined to allow the junior mortgagee to redeem. *Held:* Such facts

REDEMPTION—*Continued.*

present a case of seasonable disaffirmance of the sale and purchase by the prior mortgagee, and entitles the junior mortgagee to redeem the property conveyed in the mortgage. *Douthitt v. Nabors*, 453.

3. *Bill by junior mortgagee to redeem; should offer to do equity.* Where a bill is filed by a junior mortgagee against the holder of a senior mortgage and seeks an accounting from him and the foreclosure of the mortgage held by the complainant, and that the complainant be allowed to redeem, it is necessary that such bill should offer to pay such sum as may be ascertained to be due upon the first mortgage; and in the absence of such offer the bill is subject to demurrer.—*Higman v. Humes*, 617.
4. *Same; necessary that second mortgage should be due and payable.*—One of the essential requisites of maintaining such a bill is that the mortgage debt of the complainant should be due and payable; and if the bill filed for such purpose does not aver that the complainant's mortgage is due and payable at the time of the filing thereof, it is subject to demurrer.—*Ib.* 617.

RENT.

See LANDLORD AND TENANT.

RESCISSION.

See CONTRACTS and SALES.

RETAILING SPIRITUOUS LIQUORS.

See CRIMINAL LAW, SUB-TITLE.

RIGHT OF WAY.

See EASEMENTS and RAILROADS.

SALES.

1. *Judicial sale; not affected by maintenance or adverse possession.* A judicial sale made by a public officer under legal process, is not without the doctrine of champerty or maintenance; and its validity is not affected by the fact that the land is, at the time of the sale, in the possession of a third person claiming adversely to the defendant in the process.—*Griffin v. Dauphin*, 543.
2. *Same; effect on the possession of third person through tenant.* Where, at the time of a sale under execution of land in the possession of tenants of a third party who claim under a deed from the defendant in execution, which deed was executed subsequent to the issuance of the execution, the judicial sale of such lands terminates the tenancy; and the attornment of the tenants of said third party to the purchaser has the legal effect of transferring the possession of the lands from such third party to the purchaser, and the right of said third party acquired by his deed from the defendant in execution is thereby defeated; the sheriff's deed to said purchaser conveying such title as the defendant in execution had on the date of its issuance.—*Ib.* 543.
3. *Sale of articles of merchandise; implied warranty; duty of purchaser upon discovering defects.*—Where articles of merchandise are sold by description and for the purpose of resale by the purchaser, there is an implied warranty that the articles sold shall not only answer the description, but that they shall be merchantable; and if upon their delivery such articles are in bad condition, and are to a great extent unmerchantable, the purchaser, upon a discovery of such con-

SALES—*Continued.*

dition, has the right either to rescind the sale within a reasonable time and return the articles, or retain them and avail himself of the damage suffered either by bringing his cross action for the breach of the warranty, or by proving their real value and abating the purchase price *pro tanto*. *Frith & Co. v. Hollan*, 583.

SHERIFFS.

1. *Sheriff; sufficient execution of sheriff's bond.*—Where a sheriff, before entering upon the discharge of his duties as such officer, prepares his official bond, writing his name and the name of his sureties in the body of the bond, but through oversight fails to sign the bond as principal obligor, though the same was signed by his sureties, and the bond so filled out and signed was by said sheriff delivered to the probate judge and was approved and recorded by him as said sheriff's official bond, and he, thereupon, entered upon the discharge of his duties as such sheriff under said bond, and acted as said sheriff, such bond, as to the sureties signing it stands, under the provisions of the statute, (Code, § 3089) in the place of the official bond of the sheriff subject, if its conditions are broken, to all the remedies which the person aggrieved might have maintained on the official bond of such sheriff, executed, approved and filed according to law. (Tyson, J., *dissenting*.)—*McKissack v. McClendon*, 558.

SPECIFIC PERFORMANCE.

1. *Contract by administrator; when invalid; specific performance.* One P. died intestate leaving his estate incumbered with a mortgage. Immediately after their appointment, the administrators of the estate of said P. entered into a contract with the mortgagee for the purpose and intention of paying off and discharging the said mortgage indebtedness. The contract so entered into, after specifying the indebtedness of the estate to the mortgagee in a large amount and that it was evidenced by promissory notes and secured by a mortgage upon the lands of the estate, and further reciting that the mortgagee had agreed to extend the payment, stipulated on the part of the mortgagors, that they would, for a period of seven years, up to the time of the extension agreed to by the mortgagee, turn over to and pay unto the mortgagee all the rents, incomes and profits from the intestate's estate, which were to be used to pay and satisfy first the advances agreed to be made by the mortgagee from year to year during the period stipulated, and then to be used towards the payment and satisfaction of the mortgage debt due by the intestate to the mortgagee. *Held*: That the administrators were without authority to enter into such a contract; that said contract was not binding upon the estate of the intestate, was invalid and could not be specifically enforced against the administrators in their representative capacity.—*Winston Jones & Co. v. Peebles*, 290.

STATUTORY CLAIM SUIT.

See TRIAL OF THE RIGHT OF PROPERTY.

STOCKS AND STOCKHOLDERS.

1. *Corporations; right of minority stockholder to maintain bill to distribute assets of corporation.*—When a private business corporation, though solvent, in that it owes no debts, is a failure, and the purposes for which it was organized are im-

STOCKS AND STOCKHOLDERS—Continued.

possible of attainment, and its assets are being gradually sacrificed in the payment of taxes and expenses, the minority stockholders of such corporation can maintain a bill in equity to have the corporate assets sold and the proceeds thereof distributed among the stockholders.—*Noble v. Gadsden L. & I. Co.*, 250.

STREETS.

See HIGHWAYS.

STREET RAILROADS.

See RAILROADS, SUB-TITLE.

SUBROGATION.

1. *Equitable assignment and subrogation; when shown to exist.* Where one who, though having no previous interest and being under no obligation, pays off a mortgage or advances money for its payment at the instance of the mortgagor, and for his benefit, such person is in no true sense a stranger and volunteer, but is, under the doctrine of equitable assignment, entitled to be subrogated to the lien of said mortgage for the reimbursement of the amount paid thereon.—*Motes v. Robertson*, 630.

SUPERINTENDENCE.

See NEGLIGENCE AND RAILROADS.

SUPREME COURT.

See COURTS, SUB-TITLE.

SURETIES.

1. *Mortgage to secure advances of money paid for mortgagor; when modification binding.*—Where the surety on a bond executes a note and mortgage to his co-surety for the purpose of securing the latter, in the payment of one-half of a designated amount to be paid by him in effecting the compromise of a judgment rendered against them, and the plaintiff in said judgment declines to accept said amount, it is competent for the mortgagor and mortgagee to modify the agreement so as to change the application of the money provided for by the note and mortgage; and upon the mortgagee subsequently effecting a compromise of said judgment by paying a larger amount than the sum stipulated in said mortgage, which was done with the mortgagor's consent and approval, said note and mortgage constitute a valid and binding obligation, and the consideration therefor did not fail and the mortgage thereby become extinguished when the first offer of compromise was rejected and the sum returned to the mortgagee.—*Sheats v. Scott*, 642.

TAXATION.

1. *Municipal corporation; construction of charter as to power of paving.*—The section of a city charter which provides "that it shall be lawful for said city council from time to time and in such manner as it may determine, to pave, gravel, or macadamize any street, avenue, square, public place or alley in whole or in part within the corporate limits or said city, whenever said city council may deem it necessary or expedient to do so; and for that purpose said city council is hereby authorized and empowered to adopt and provide the means therefor," is sufficiently comprehensive to include and

TAXATION—Continued.

- authorize side-walk paving; the term "street" in such connection applying to the whole thoroughfare, including the sidewalk.—*City Council of Montgomery v. Foster*, 587.
2. *Same; assessment for street paving must be in proportion to benefit to abutting property.*—No municipal corporation can, under the constitution, make any assessment for the costs of sidewalk or street paving, or for the costs of the construction of any sewers or the placing of curbing on a sidewalk, against the property abutting on such street or sidewalk so paved or drained, in excess of the increased value of such property, by reason of the special benefits derived from such improvements; and an assessment of the costs of paving levied against the adjacent property without reference to the extent of the benefit to the property, is invalid, will be vacated, and the costs of paving so assessed can not be collected. (MC-CLELLAN, C. J., *dissenting*.)—*Id.* 587.
 3. *Taxation; assessment necessary to collect taxes.*—An assessment is the first step and an indispensable incident in proceedings to collect taxes; and being the foundation of all subsequent proceedings, no taxes can be collected without a valid assessment.—*Id.* 587.

TELEGRAPH COMPANY.

1. *Action against telegraph company for personal injuries; sufficiency of complaint.*—In an action against a telegraph company by one who was traveling along the public highway, to recover damages for personal injuries received as the result of a wire used by the defendant having fallen across the public road, where the complaint alleges that the team which was attached to the vehicle in which he was riding, came in contact with said wire, and by reason thereof became unmanageable and the plaintiff was thrown from the wagon and fell upon said wire and received the injuries complained of, and it was averred that the defendant owned and operated said telegraph wire which was heavily charged with electricity "and it became and was the duty of the defendant to use due care to have and keep said wire high up from said road, yet, notwithstanding said duty defendant negligently caused or allowed said wire to be or remain on, or such a short distance above, said public highway that the public traveling said highway were liable to be injured thereby," sufficiently charges a cause of action and is not subject to demurrer upon that ground, or upon the further ground that it fails to show the duty on the part of the defendant to keep its wire out of the way of travelers along the public road.—*Postal Tel. Cable Co. v. Jones*, 217.
2. *Action against telegraph company; when negligence a question for the jury.*—In an action by one who was traveling along a public road against a telegraph company, to recover for personal injuries alleged to have been caused by reason of the defendant's negligence in allowing a wire charged with electricity to be or remain on or a short distance above the road, whereby the traveling public along said road were liable to be injured, and the defendant by special plea sets up that it exercised reasonable care to prevent its wires from becoming detached from its poles, and that it did not know and by the exercise of reasonable care could not have known that the wires had become detached from the pole, until after the injury to the plaintiff, and where the evidence for the plaintiff tends to show that at the point where the injury was alleged to have been caused the wire owned and

TELEGRAPH COMPANY—*Continued.*

operated by the defendant had become disengaged from the pole to which it was attached, by reason of the cross pole being rotten, and that the wire had been detached for two days or more before the injury complained of was inflicted. It is a question for the jury whether due care alleged had been proved, or whether due care had been exercised to discover and remedy the defective condition of the wire; and, therefore, the general affirmative charge requested by the defendant is properly refused.—*Ib.* 217.

3. *Action against telegraph company; inconsistency of court in rulings upon charges requested by defendant.*—In an action by one who was traveling along a public road against a telegraph company, to recover for personal injuries alleged to have been caused by reason of the defendant's negligence in allowing a wire charged with electricity to be or remain on or a short distance above the road, whereby the traveling public along said road were liable to be injured, there is no inconsistency on the part of the trial court in giving a charge at the request of the defendant which left the jury free to find that the wires, poles and cross arms of defendant's line were not in safe and good condition when they were last inspected, and upon so finding to return a verdict for the plaintiff, and refusing at the request of the defendant the general affirmative charge in its behalf.—*Ib.* 217.

TENANTS IN COMMON.

1. *Ejectment by tenants in common; proper judgment therein.*—In an action of ejectment, where the plaintiffs and defendant are tenants in common, and the plaintiffs claim an undivided interest in said lands, upon a verdict returned in favor of the plaintiffs, a judgment in their favor declaring that they recover of the defendant the undivided interest sued for in the complaint is proper, and in such case it is not material whether all of the tenants in common are joined in the action. *Butler v. Butler*, 373.

TENDER.

1. *Statutory right of redemption; sufficiency of tender.*—One of the conditions precedent to the exercise of the statutory right of redemption from a sale under a mortgage, is the payment or tender to the purchaser by the mortgagor of the purchase money with ten *per centum* thereon and all lawful charges (Code, § 3507); and the fact that the purchaser at the foreclosure sale has within the time allowed for redemption sold a part of the land so purchased by him and received payment therefor, does not excuse the redemptioner from paying the full amount of the purchase money with ten *per cent.* and all other lawful charges, in order to entitle him to exercise the statutory right.—*Burke v. Brewer*, 389.

TRESPASS AND TRESPASSERS.

1. *Trespass; recovery of exemplary or vindictive damages.*—In an action of trespass, exemplary or vindictive damages are recoverable if the trespass is committed with a bad motive, with an intent to harass or oppress or to injure.—*Hicks Bros. v. Swift Creek Mill Co.*, 411.

TRIAL AND ITS INCIDENTS.

1. *Action against telegraph company; inconsistency of court in rulings upon charges requested by defendant.*—In an action by one who was traveling along a public road against a

TRIAL AND ITS INCIDENTS—*Continued.*

telegraph company, to recover for personal injuries alleged to have been caused by reason of the defendant's negligence in allowing a wire charged with electricity to be or remain on or a short distance above the road, whereby the traveling public along said road was liable to be injured, there is no inconsistency on the part of the trial court in giving a charge at the request of the defendant which left the jury free to find that the wires, poles and cross arms of defendant's line were not in safe and good condition when they were last inspected, and upon so finding to return a verdict for the plaintiff, and refusing at the request of the defendant the general affirmative charge in its behalf.—*Postal Tel. Cable Co. v. Jones*, 217.

2. *Trial and its incidents; admissibility of evidence relating to the manner of arriving at verdict by jury on motion for a new trial.*—On a motion for a new trial, evidence by the jurors who tried a case as to the manner of their arriving at a verdict, is inadmissible in evidence.—*Montgomery St. R. Co. v. Mason*, 508.

TRIAL OF THE RIGHT OF PROPERTY.

1. *Trial of the right of property; sufficiency of verdict.*—While under the provisions of the statute it is the duty of the jury on the trial of the right of property to assess in their verdict the value of each item of property involved separately, if practicable, (Code, § 4143), if there appears no evidence as to the value of each item of the property, and it is recited in the verdict of the jury that the jury find "the issue in favor of the plaintiff for the property described as per agreement," the fact that the jury fail to assess in their verdict each item of property in controversy separately, does not render such verdict insufficient to support a judgment in favor of the plaintiff; the court presuming under such circumstances that it was either impracticable for the jury to assess such items of the property separately, or that the failure to do so was in accordance with the agreement referred to therein.—*Massillon E. & T. Co. v. Arnold*, 368.
2. *Garnishment; interposition of claim.*—In response to a writ of garnishment issued upon a judgment, the garnishees answered indebtedness to the defendant, but suggested a third party as claimant. In the claim suit instituted, it appeared that the indebtedness of the garnishees was evidenced by note made to the defendant, that this note was given for the purchase of lands belonging to the defendant's wife, and by mistake was made payable to him; that immediately upon its delivery to him and before the issuance of the writ of garnishment, the defendant indorsed the note to his wife, who, after the service of the writ of garnishment, transferred and endorsed it to the claimant. *Held*: That the plaintiff in the judgment was not entitled to condemn the amount due from the garnishees on the note to the satisfaction of his judgment. *Jones v. Nolen*, 567.

UNDUE INFLUENCE.

1. *Bill to set aside conveyance on account of undue influence; necessary allegations.*—In a bill filed seeking to have set aside and cancelled a deed, upon the ground that its execution was obtained by undue influence, it is not necessary to allege with particularity the manner in which the result complained of was accomplished, but only that the deed was procured to be executed by undue influence exerted by certain

UNDUE INFLUENCE—*Continued.*

named parties; since the inquiry in such a case is not whether the improper influence was sufficient to have coerced the will of a man of ordinary capacity and force of character, but only whether the influence, whatever it may have been, did, in fact, control the execution of the instrument involved in the controversy.—*Letohatchie Baptist Church v. Bullock*, 548.

See WILLS.

USURY.

1. *Usury; how pleaded.*—When the defense of usury is interposed by plea or answer, the terms and nature of the alleged usurious agreement must be stated with clearness and definiteness; and the averments in the answer to a bill to foreclose a mortgage that "said note and mortgage is usurious and void for the interest, and respondent here plead the same," is wholly insufficient to present the issue of usury.—*Clark v. Johnson*, 432.
2. *Same; bona fide purchaser.*—Where one claims under a mortgage as a *bona fide* purchaser for value and without notice, and there is usury in the debt, the fact of usury may be shown without a plea of usury.—*Id.* 432.
3. *Same; effect of usury as to bona fide purchaser.*—An agreement to pay usury upon a debt secured by a mortgage, so infects and taints the transaction as to preclude the mortgagee from being a *bona fide* purchaser without notice.—*Id.* 432.

VENDOR AND PURCHASER.

1. *Usury; bona fide purchaser.*—Where one claims under a mortgage as a *bona fide* purchaser for value and without notice, and there is usury in the debt, the fact of usury may be shown without a plea of usury.—*Clark v. Johnson*, 432.
2. *Same; effect of usury as to bona fide purchaser.*—An agreement to pay usury upon a debt secured by a mortgage, so infects and taints the transaction as to preclude the mortgagee from being a *bona fide* purchaser without notice.—*Id.* 432.
3. *Estates; when purchaser from remainderman acquires title; ejectment.*—Where a testator devises his land to his wife for life which is, "after her death to be equally divided between my [his] children which may then be surviving," and the life tenant and each of the children of the testator executes a warranty deed to such land, the grantee in such deed acquires a fee simple title to said land; and the death of each of the children of the testator before the death of the life tenant does not give the heirs of the remaindermen the right to maintain an action of ejectment against the grantee in said deed.—*Acree v. Dabney*, 437.
4. *Sale of articles of merchandise; implied warranty; duty of purchaser upon discovering defects.*—Where articles of merchandise are sold by description and for the purpose of resale by the purchaser, there is an implied warranty that the articles sold shall not only answer the description, but that they shall be merchantable; and if upon their delivery such articles are in bad condition, and are to a great extent unmerchantable, the purchaser, upon a discovery of such condition, has the right either to rescind the sale within a reasonable time and return the articles, or retain them and avail himself of the damage suffered either by bringing his cross action for the breach of the warranty, or by proving their real value and abating the purchase price *pro tanto*.—*Frith & Co. v. Hollan*, 583.

WAIVER.

1. *Promissory note; when demand for trial by jury waived, and judgment by default proper without writ of inquiry.*—Where in a suit on a promissory note, after the defendant files pleas accompanied by a demand for a trial by jury, the parties enter into an agreement, wherein it is stipulated that if the amount sued for is not paid within a stipulated time, judgment by default can be rendered for the full amount of the claim with interest, a judgment by default, after the lapse of the stipulated time, ascertaining the debt and damages without a jury, is proper and not subject to objection; said agreement, in effect, withdrawing the pleas, and putting the case on the same footing as if they had never been filed and no demand for a jury had ever been made.—*Peoples I. Co. v. Peoples Nat. Bank*, 248.
2. *Jurisdiction of justice of the peace; waiver of objection.*—On an appeal from a judgment of the justice of the peace, his want of jurisdiction can not be availed of unless the objection thereto was made before the justice of the peace; and the question comes too late if presented for the first time on motion for a new trial in the circuit court where the cause was carried on appeal.—*Clem v. Wise*, 403.
3. *Cancellation for fraud; waiver of right.*—The right to rescind a contract of sale and to have the deed of conveyance cancelled may be waived by the party in whom the right resides, whether he be the party originally injured, or his successor in interest; and while such waiver may be implied from conduct inconsistent with the intention to rescind, as evidenced by long acquiescence in the transaction, the mere delay in instituting proceedings to avoid the deed, is subject to explanation showing that it was not caused by acquiescence in the sale.—*Walling v. Thomas*, 426.

WAREHOUSE AND WAREHOUSEMEN.

1. *Liability of railroad company as common carrier and as warehouseman.*—When a railroad company receives goods for transportation, transports them to the point of destination and informs the consignee of their arrival and affords him a reasonable opportunity to remove them, its duty and liability as a common carrier cease, and if the goods are then left in its custody, its liability for subsequent loss or damage is that of warehouseman only.—*Frederick v. L. & N. R. Co.*, 486.
2. *Same; same; when recovery can not be had on a claim against a railroad company as common carrier.*—In an action against a railroad company for the loss of goods, where the complaint declares against the defendant as a common carrier, a recovery can not be had upon proof of the loss which occurred after the defendant's duty and liability as a common carrier had terminated, and while the goods had been left in its custody as a warehouseman.—*Ib.* 486.

WARRANTY.

1. *Sale of articles of merchandise; implied warranty; duty of purchaser upon discovering defects.*—Where articles of merchandise are sold by description and for the purpose of resale by the purchaser, there is an implied warranty that the articles sold shall not only answer the description, but that they shall be merchantable; and if upon their delivery such articles are in bad condition, and are to a great extent unmerchantable, the purchaser, upon a discovery of such con-

WARRANTY—*Continued.*

dition, has the right either to rescind the sale within a reasonable time and return the articles, or retain them and avail himself of the damage suffered either by bringing his cross action for the breach of the warranty, or by proving their real value and abating the purchase price *pro tanto*. *Frith & Co. v. Hollan*, 583.

WATERS AND WATER COURSES.

1. *Nuisance; when bill can be maintained by private citizen for its abatement.*—A nuisance which operates to destroy the health of a family or to seriously diminish the comfortable enjoyment of a dwelling house, is productive of irreparable damage and mischief, for which the law furnishes no adequate remedy; and a person whose health or the comfort of whose house is damaged and affected thereby, may maintain a bill for the purpose of abating such nuisance.—*Richards v. Daugherty*, 569.
2. *Same; same; mill dam.*—Where the erection of dams or other obstructions which materially affect the natural flow of a running stream, results in the injury to the health of persons living in the neighborhood, or in the vicinity, such dam or obstruction, constitutes a nuisance, and may be abated by bill in equity at the suit of a person, the health of whose family is injured thereby, without waiting the trial of the issue of the nuisance *vel non* by an action at law.—*Id.* 569.
3. *Same; same; same.*—Where a bill is filed to have a mill dam abated as a nuisance, upon the ground that it results in producing ill health in the family of the complainant and in the vicinity contiguous to the dam, the fact that the malaria which caused the ill health complained of was generated in part by other causes than the mill dam, constitutes of itself no defense to the maintenance of the bill, if it is further shown that the existence of the mill dam materially contributed to the condition naturally existing, producing malaria, and intensified or made more poisonous the malaria generated by other causes.—*Id.* 569.

WILLS.

1. *Probate of will; admissibility in evidence of circumstances attending execution of the will.*—In the contest of the probate of a will, where each of the attesting witnesses are dead, and the principal issue is as to whether or not the will was duly executed, and the genuineness of the signatures of each of the attesting witnesses has been shown, it is competent for a witness who was staying with the testatrix and who had seen the will and recognized the signature of the testatrix immediately after its execution, to testify to the circumstances attendant upon the execution of said will, such as the reasons why the will was made, the going to the room of the testatrix of the lawyer and attesting witnesses for the purpose of its execution; and this is true, although such witness was not in the room at the time of the writing of the will, or when it was signed by any one, and, therefore, did not see its execution.—*Woodroof v. Hundley*, 395.
2. *Same; when evidence relating to revocation inadmissible.*—On the contest of the probate of a will, where one of the grounds of contest was that the will had been revoked and the proponent had shown *prima facie* its due execution, declarations of the testatrix that the instrument offered for probate was not her will, and the fact that after its execution she had sold or offered to sell certain property disposed of by said

WILLS—Continued.

- will, or that there had been a change in the testatrix' church relations, or that the estrangement between the testatrix and the contestant's father had been adjusted before her death, are immaterial and constitute no evidence of a revocation and, therefore, incompetent as evidence.—*Ib.* 395.
3. *Contest of will; when general affirmative charge given as to grounds of contest.*—Where the probate of a will is contested upon several grounds, and there is an entire absence of evidence to support the same by the grounds of contest, it is proper for the court at the request of the proponent to give the general affirmative charge in favor of the proponent as to the grounds which were not supported by any evidence. *Ib.* 395.
 4. *Same; charge to the jury.*—On the contest of the probate of a will, a charge is erroneous and properly refused which instructs the jury that if they "find from the evidence that it is as reasonable to infer that the alleged attesting witnesses to the paper offered in evidence as the last will of W., deceased, subscribed their names thereto out of her presence, as that any two of them subscribed their names in her presence, then they may find in favor of the contestant."—*Ib.* 395.
 5. *Estates; when vested remainder created by will.*—Where a testator under his will devises land to his wife for life, which is "after her death to be equally divided between my [his] children which may then be surviving," the wife takes a life estate in the land and each of the children of the testator takes a vested remainder subject to be divested only by the survivorship of one or more of such children after the falling in of the life estate.—*Acree v. Dabney*, 437.
 6. *Same; same; when purchaser from remainderman acquires title; ejectment.*—Where a testator devises his land to his wife for life, which is, "after her death to be equally divided between my [his] children which may then be surviving," and the life tenant and each of the children of the testator executes a warranty deed to such land, the grantee in such deed acquires a fee simple title to said land, and the death of each of the children of the testator before the death of the life tenant does not give the heirs of the remaindermen the right to maintain an action of ejectment against the grantee in said deed.—*Ib.* 437.

WITNESSES.

1. *Evidence; when secondary evidence of testimony of absent witness admissible.*—When a witness has removed from the State permanently or for an indefinite time, his testimony on any former trial of the defendant for the same offense may be given in evidence against the defendant on any subsequent trial.—*Jacobi v. State*, 1.
2. *Same; same; case at bar.*—On a trial under an indictment for an assault with intent to rape, it was shown that upon a former trial of the defendant for the same offense there was a mistrial; that the woman alleged to have been assaulted was present and testified on the former trial; but that she was not present at the second trial. The return of the officer on the subpoena issued for the woman assaulted showed that she could not be found in the county of her former residence, which was the only residence there was any evidence tending to show she ever had in the State. It was shown that she was not married, and had always resided with her mother. A brother of said witness

WITNESSES—*Continued.*

testified that his mother's home, where his sister lived, had been broken up after the first trial of the defendant, and his mother had moved to Georgia, and that his sister had also gone to Georgia, and that a short time before the present trial, he had received a letter from his sister which was written by her in Georgia, where she had been after the removal from this State. Her brother further testified that after the former trial she stated that she would "rather die than go back to another trial and go through the same ordeal." *Held:* That such evidence showed with requisite clearness that said witness was permanently or indefinitely absent from the State at the time of the trial, and that secondary evidence of her testimony on the former trial was admissible.—*Ib.* 1.

3. *Homicide; wife not competent witness for husband.*—On a trial under an indictment for murder, the wife of the defendant is incompetent as a witness for her husband.—*Lide v. State*, 43.
4. *Argument of counsel; failure to examine witness; error without injury.*—In the trial of a criminal case, the failure of the defendant to introduce a witness subpoenaed and present, in support of the testimony of another witness examined in behalf of the defendant in reference to a fact wholly immaterial and irrelevant to any issue involved in the trial, is not the legitimate subject of comment by an attorney for the prosecution in his argument to the jury; but the refusal of the court to stop the State's counsel in commenting upon such failure of the defense is error without injury, and, therefore, will not, under the statute (Code, § 4333), work the reversal of the judgment of conviction.—*Ib.* 43.
5. *Trial and its incidents; when not error for court to adjourn from court room to another room in the court house for the purpose of examining witness.*—It is not error, nor a ground of objection from any point of view, that during the trial of a criminal case the court, with the jury, the defendant, officers of the court and attorneys repaired from the court room, where the trial was being conducted, to the sheriff's office, which was in another part of the court house, for the purpose of examining a witness for the State, who was suffering from rheumatism, and who could not be brought into the court room without considerable pain to him.—*Scott v. State*, 112.
6. *Witness; can not be impeached on immaterial matter.*—If a witness on cross-examination is interrogated as to matter wholly immaterial to any issue in the case, the party calling for such evidence is concluded by the answer of the witness, and can not impeach the witness by contradicting such answer.—*Carter v. State*, 160.
7. *Witness; competent to show interest as affecting credibility.* The interest of the witness in a cause in which he testifies may always be shown as affecting the credibility of his testimony; and in a prosecution for the sale of liquor to a person of known intemperate habits, where the employer of the defendant testifies to facts which exonerate the defendant, it is competent for the State to ask such witness if there was not then pending against him a prosecution for the same offense.—*McCormack v. State*, 202.
8. *Final settlement of administration; widow competent witness.* On the final settlement of the administration of decedent's estate, the widow is a competent witness to testify to the fact of her marriage with decedent.—*Nolen v. Doss*, 270.

WRITTEN INSTRUMENTS.

See EXECUTION OF WRITTEN INSTRUMENTS.

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